87-437

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RICHARD PINKNEY, *et al.*,
Petitioners,

v.

DOW CHEMICAL CO., *et al.*,
Respondents.

In re "Agent Orange" Product Liability Litigation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Whether the courts below erred in holding that diversity jurisdiction exists, without complete diversity between all plaintiffs and all defendants, in a situation in which prior to the Federal Rules of Civil Procedure diversity jurisdiction did not exist, thus ruling that the federal rules have worked an expansion of federal court jurisdiction contrary to assurances given to Congress, Fed. R. Civ. P. 82, and rulings of this Court.

II. Whether the courts below erred in holding that, upon the grant of partial summary judgment in favor of one, but not all, defendants the courts' ruling is not interlocutory despite the lack of any Fed. R. Civ. P. 54(b) certificate (or a certificate that fulfills the requirements of that rule), and thus the defendant in whose favor partial summary judgment was granted ceases to be a party for the purposes of diversity — despite the fact that the court, until the end of the case (or until the requirements of Rule 54(b) are fulfilled), retains the jurisdiction to revise or recant its partial summary judgment ruling.

III. Whether the courts below erred in holding that an order of notice to a Fed. R. Civ. P. 23(b)(3) plaintiff class is valid under principles of due process and this Court's holding in *Phillips Petroleum v. Shutts*, in an action for individual tort damages:

(a) When that order does not require individual notice to each member of the class who is findable with some effort and expense and when the order provides for publication notice that is inadequately designed to reach a substantial portion of the class.

(b) When the order is not carried out (i) in that 177,426 class members whose names and addresses were in the hands of class counsel were sent no notice at all, (ii) when 57,000 notices were missent because of computer gliches, etc., and returned, no attempt was made to correct the problem and resend the returned notices, and (iii) where the publication or-

dered by the Court was not made or was made too late for class members to opt-out.

IV. Whether the courts below erred in holding that, in a plaintiff-class action for money damages, there is personal jurisdiction over involuntary members of the class throughout the United States and in foreign countries who have had no contact with the forum state and where the requirements of due process set forth in *Phillips Petroleum v. Shutts* are blatantly violated.

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PARTIES BELOW

By various estimates, there are over two hundred and seventy thousand (270,000) members of the class as ultimately certified by the district court below. Of those, it is impossible to determine and include a list of the class members who object to the class certification as required by Rule 28.1.

Richard Pinkney has been chosen as the named party since he is typical of those class members who objected to class certification.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, members of the Agent Orange class who object to the class action certification and settlement, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 21, 1987.

OPINIONS BELOW

The Opinions of the United States District Court for the Eastern District of New York (Weinstein, Ch. J.) are reported at 100 F.R.D. 718 and 597 F.Supp. 740 and are reprinted in the Single Appendix submitted with this petition at p.456a and p.135a, respectively.

The Opinion of the United States Court of Appeals for the Second Circuit is reported at 818 F.2d at 145 and is reprinted in the Single Appendix submitted with this petition at p.676a.

The Order of the Court of Appeals for the Second Circuit denying the class members' petition for rehearing was issued on June 5, 1987 and is reprinted in the Single Appendix submitted with this petition at p.778a.

The Orders of the Court of Appeals staying the issuance of the mandate pending petition for a Writ of Certiorari are printed in the Single Appendix submitted with this petition at p.780a.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The decision of the court below was issued on April 21, 1987. A timely Petition for Rehearing *En Banc* was filed, and was denied on June 5, 1987. On July 17, 1987, the Court of Appeals stayed the issuance of the mandate until August 7, 1987, on the condition that a petition for Writ of Certiorari be filed on or be-

fore that date. On August 7, the Court of Appeals continued the stay of the issuance of the mandate until such time as the United States Supreme Court rules on the petition for certiorari.

STATUTES AND RULES INVOLVED

The statute, 28 U.S.C. § 1332, and the Federal Rule of Civil Procedure 23 involved are appended to this petition.

STATEMENT OF THE CASE

This "Agent Orange" case, one of the largest, if not the largest, class action ever certified, began as many separate suits in a number of state and federal courts around the country. The cases were brought by veterans, spouses and children of veterans, and estates and survivors of deceased veterans against several chemical companies who manufactured and sold to the federal government a chemical compound known as Agent Orange, which contained the toxic chemical dioxin among other ingredients. Each plaintiff claimed injuries due to exposure to Agent Orange. The general gravamen of the tort actions was that the chemical companies knew of the toxicity of Agent Orange but failed to advise the federal government of the danger within their knowledge.

Each of the federal cases was transferred for pretrial purposes to the Eastern District of New York under the Multidistrict Litigation Statute, 28 U.S.C. § 1407. They were first assigned to Judge George Pratt and later to Chief Judge Jack Weinstein. At first, Judge Pratt had ruled that he had federal question jurisdiction. *In re "Agent Orange" Product Liability Litigation*, 506 F.Supp. 762 (E.D.N.Y.), *rev'd,* 635 F.2d 987 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123, 102 S.Ct. 980 (1984). (App. 1a.) That ruling was reversed by the Second Circuit, which held that the case could be in federal court, if at all, under the diversity of the citizenship jurisdiction of that court. *In re "Agent Orange" Product Liability Litigation,* 635 F.2d 987 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123, 102 S.Ct. 980 (1984). (App. p. 641a) The case was remanded and Chief Judge Weinstein formally certified the class. *In re "Agent*

Orange" Product Liability Litigation, 100 F.R.D. 718, *mandamus denied sub nom., In re Diamond Shamrock Chemicals Co.,* 725 F.2d 858 (2d Cir.), *cert. denied,* 465 U.S. 1067, 104 S.Ct. 1417 (1984). (App. p. 456a)

Trial was scheduled for May 7, 1984. Notice to class members was not initiated until after March 9, 1984. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 756 (E.D.N.Y. 1984). (App. p. 165a) The deadline for opting out was May 1, 1984. On the eve of trial, Plaintiffs' Management Committee ("PMC") and the defendants agreed to a proposed settlement. A fund of $180,000,000 was proposed to be set up to be distributed among the class members in accordance with a distribution scheme still to be agreed upon.

Fairness hearings were held in five cities over a total of eleven days. The hearings were of a non-evidentiary nature. No examination of the proponents of the settlement was permitted. Judge Weinstein thereupon preliminarily approved the settlement, 597 F.Supp. 740, (App. p. 135a), and on May 28, 1985, approved a distribution plan.

The defendant chemical companies had vigorously opposed the class certification from the time of the first application up to the time that the settlement was reached. At least by June or July 1984, certain non-PMC counsel for plaintiffs also moved to have the class action certification vacated. On July 5, 1984, some of the non-PMC counsel moved to have a subclass of objectors certified, to have counsel appointed for that subclass, and to conduct discovery as to the fairness and adequacy of the settlement. The motion was was denied. *Id.* at 757 (App. p. 167a).

Non-PMC counsel for class members objected to the class action on various grounds, including lack of subject-matter jurisdiction, lack of personal jurisdiction, lack of an order directing adequate notice to satisfy either the requirements of Federal Rule 23(c) or of due process, failure on the part of PMC counsel to furnish even the inadequate notice ordered by the District Court, error on the part of the District Court in creating "national consensus

law" in order to avoid the problems posed by the differing laws of the various states, and other grounds going to the procedure and fairness of the approval of the settlement. All objections were overruled and all motions containing the objections were denied.

After all timely filed motions for reconsideration were denied, notices of appeal were timely filed. On April 21, 1987, the United States Court of Appeals for the Second Circuit affirmed on each of the issues going to the jurisdiction of the district court, the validity of the class action, and the settlement (with one exception not relevant to this Petition). Timely filed petitions for rehearing were denied on June 5, 1987.

REASONS FOR GRANTING THE WRIT

Preliminarily, it should be noted that this petition for a writ of certiorari is one of at least three that have been or are being filed in this matter. One of the additional petitions is being filed by persons who were able to opt-out of the class. A word needs to be said about that petition and how it relates to the instant petition.

There were almost 2,000 class members who opted out of the class action and did not rejoin under the provisions of the settlement. In many of those cases, Judge Weinstein granted summary judgment for the defendants on grounds common to all class members. Upon timely appeal, the Second Circuit affirmed.

Should this Court grant the instant petition and reverse, but deny the petition filed by the opt-outs, the settlement would be set aside and, depending upon the grounds of reversal, there would be a strong possibility that the class action certification itself would be vacated. All the federal cases assigned to Judge Weinstein under the Multidistrict Litigation Statute would continue to pend before Judge Weinstein and would be ripe for the grant of summary judgment for the defendants. Therefore, a grant of the instant petition with a denial of the opt-out petition would be a Pyrrhic victory, accomplishing nothing as far as the instant petitioners are concerned. For these reasons, the instant petition is conditional

upon the grant of the petition filed by the opt-outs on this day.[1] Should the opt-outs' petition be denied, the instant petition is withdrawn.

The Issues Before This Court. The instant case is of a magnitude and complexity unlike any other. The number of claims, the severity of the claimed injuries, the sympathy for those involved, the amount of money involved, the complexity of the issues, both factual and legal, and the real and potential drain upon judicial resources make this case in many respects *sui generis*. The District Court was brilliant in cutting through a tremendous dispute in a most efficient manner. That court created new law where new law achieved an efficient result.

Yet, in achieving this efficiency, fundamental values, statutory restrictions, and holdings of this Court have been swept aside. The District Court created subject-matter jurisidction where there was none before, ignoring the assurance given Congress that the rule-making power would not be used to extend federal court jurisdiction. The court reached throughout the United States, Australia, and New Zealand to sweep into its power persons lacking contact with New York, wiping out their individual causes of action. The District Court's efficient result was at a cost of due process: claims and rights wiped out without notice, or with notice that was inadequate and too late to constitute notice. The court even ignored the fact that its own notice order was not carried out. The cost is best seen in notice given in an April 30th *Time Magazine* and a May 1 *USA Today* with the opt-out period ending May 1st; of one-third of all written notices undelivered because of error; of governors invited to send lists of veterans and then notices not sent to names furnished; of 177,496 names and addresses in hand of veterans exposed to Agent Orange to whom notice was never sent; and of veterans who, seven weeks before the expiration of the opt-out period, telephoned an "800" number only to be told to call back four weeks later.

[1] Of course, there is always a risk that, if both petitions are granted, this Court may agree with one or more of the arguments for reversal raised by the instant petitioners and reject all argument for reversal raised by the opt-out petitioners. That risk is recognized and taken.

Efficient, yes, but in terms of a due process heretofore unknown. Efficiency that asked for reactions to a settlement proposal that was not yet developed and known, and swept aside objections on those grounds. Efficiency that swept aside *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and resurrected *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) for diversity cases where it would be inefficient to worry about the vagaries of state law, creating a new body of law, to be known as "national consensus law," which most efficiently will be whatever the federal trial judge deems in a difficult case.

Each of these District Court rulings was affirmed by the Court of Appeals. If this case stands, we may expect more judicial efficiency. But we will also see the concept of complete diversity swept away whenever there is a group large enough for a class action. The jurisdictional amount requirement of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) will no longer stand in the way of the efficient use of federal court power. A federal court will be able to sweep into its power the individual rights, claims, and property of persons wherever they may be in the world, and terminate them. Finally, the federal case books will be replete with federal judges writing of "national consensus law" whenever it helps resolve difficult problems.

This introduction is by way of emphasizing that the issues in this case are of vast significance. To achieve a brilliantly efficient result, the courts below cut through much of what we thought was law. If allowed to stand, this case will not remain isolated by itself; the era of federal court power will be just beginning.

I. THE COURTS BELOW ERRED IN RULING THAT FED. R. CIV. P. 23 HAS EXPANDED FEDERAL DIVERSITY JURISDICTION CONTRARY TO THE LIMITATION OF THE RULES ENABLING ACT.

This is a diversity case. Yet, complete diversity does not exist between all members of the plaintiff class and the defendants.[2]

[2] There are over 246,000 claims filed, coming from every state and the District of Columbia. It is manifest that complete diversity does not exist.

When Congress, in the Enabling Act, 28 U.S.C. § 2072, gave this Court power to promulgate rules of procedure for the federal courts, it was clearly understood that Congress did not bestow power to extend the jurisdiction of the federal courts:

> Nor can we overlook the fact that the Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of federal courts. If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts.

Snyder v. Harris, 394 U.S. 332, 341–42 (1969); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1942).[3]

In the instant case, the courts below violated these limits. They used a federal rule to expand federal jurisdiction where it did not exist in 1938, when the Federal Rules were first promulgated. No matter how desirable this expansion may be, such action goes beyond the power of the courts.

A. The Courts Below Used the Federal Rules to Expand Diversity Jurisdiction Beyond Where It Existed in 1938.

The doctrine of complete diversity. It is well established that in a diversity case there must be complete diversity between all plaintiffs and all defendants. *State Farm Fire and Casualty Co. v. Tashire*, 386 U.S. 523 (1967); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Various attempts have been made to carve out court-made exceptions. But these attempts have been rejected, most recently in *Owen Equipment & Erection Co. v. Kroger*, 347 U.S. 365, 377 (1978).

The class action device. Prior to 1938, the instant class action could not have been brought in federal court. Class actions

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[3] This understanding was then, and remains, embodied in Rule 82: "These rules shall not be construed to extend or limit the jurisdiction of the United States district court . . . ."

were a device of equity, *see* Wright & Miller, *Federal Practice & Procedure*, § 1751 at 503–09 (1972), embodied in Federal Equity Rule 38, 226 U.S. App. 11:

> When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

The first significant class action, *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), concerned a class suit brought to determine the proper allocation between classes of beneficiaries and ultimate disposition of trust funds held by a fraternal benefit association. The lower court termed this a "true class suit" presenting questions common to all members of the class. *Id.* at 361. The named representative parties were from states other than Indiana; the defendants were Indiana citizens. This Court held the class action decree binding on all members of the class, including absent members who were Indiana citizens and hence not diverse from the defendants.

Significantly, the subject of the action in *Ben-Hur* was "the control and disposition of the funds of a beneficial organization," a dispute cognizable in equity, which could be prosecuted only if all interested persons were before the court. *Id.* at 366–67. This Court ruled that, as the Indiana class members could have intervened in the class action under the doctrine of ancillary jurisdiction, their common citizenship with the defendants was no bar. As Equity Rule 38 did not permit the bringing together of a large number of individual tort claims into a single class action, *Ben-Hur* does not stand for the proposition that complete diversity may be waived in such cases. And, indeed, prior to 1938, it could not.

The 1938 Federal Rule 23. When the Federal Rules were proposed in 1936, the Preliminary Draft contained no separate class-action rule. *See* Moore, *Federal Rules of Civil Procedure*, 25 Geo. L.J. 551, 570 (1937). Such a rule was proposed by Professor Moore, *see Id.* at 571, and Rule 23(a) as promulgated was his language. The 1938 Rule 23 provided for three types of class actions,

true, hybrid, and spurious, depending on whether the character of the rights sought to be enforced for or against the class was:

> 1. joint, or common, or secondary in the sense that the owner of a primary right refuse to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> 2. several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> 3. several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

While 23(a)(1) and 23(a)(2) class actions—the "true" and the "hybrid"—were recognizable restatements of Equity Rule 38, 23(a)(3)—the "spurious" class action was admittedly new.

Moore explained that the spurious class action "is a permissible joinder device," pure and simple. 2 Moore, *Federal Practice* 2241 (1938). As the 1938 Federal Rules 18 and 20 in fact embodied liberal permissive joinder rules, Moore had another purpose in mind: to evade the jurisdictional requirement of federal court suits and most particularly the complete diversity requirement of 28 U.S.C. § 1332 and *Strawbridge*. Indeed, Moore was quite candid:

> [I]n the federal courts where there must be complete diversity between all of the plaintiffs on the one side and all of the defendants on the other, ... the spurious class action can be justified in federal procedure. Once jurisdiction attaches the action would not be defeated by interventions, hence, the class action offers the possibility of clearing up a litigious situation.

Moore, *Federal Rules of Civil Procedure*, 25 Geo. L.J. 551, 557 (1937). While it was then clear that in cases of permissive joinder each party needed to satisfy federal jurisdiction requirements independently, *Pinel v. Pinel*, 240 U.S. 594 (1916); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), Moore urged that in a spurious class action only the named representatives need meet those re-

quirements. 2 Moore, *Federal Practice*, 2245, 2295, 2412 (1938). Moore cited no authority for that proposition, not even *Ben-Hur*, apparently recognizing that *Ben-Hur* was a true and not a spurious class action.

Professors Kalven and Rosenberg, after summarizing Professor Moore's candid intent, stated that the spurious class action "functions exclusively as a trick for obtaining federal jurisdiction". Indeed, they termed it "absurd," having "no function" except to manufacture federal jurisdiction. Kalven & Rosenberg, *Functions of Class Suit*, 8 Chi. 684, 704 (1941). Professors Hart and Weschler agreed, calling Moore's ploy "so bold an enlargement of federal jurisdiction." Hart and Weschler, *Federal Courts and Federal System* at 937 (1953). Professor Wright in 1963 called it "a major extension of federal jurisdiction." Wright, *Law of Federal Courts* § 72, at 472 (1st ed. 1963).[4] Moore's attempt to expand federal jurisdiction through Rule 23 was rejected by at least three circuits. *Hackner v. Guaranty Trust Co. of New York*, 117 F.2d 95 (2d Cir. 1941); *Steele v. Guaranty Trust Co. of New York*, 164 F.2d 387 (2d Cir. 1947); *Knowles v. War Damage Corp.*, 171 F.2d 15, 18 (D.C. Cir. 1948); *Farmers Co-op Oil Co. v. Socony Vacuum Oil Co.*, 133 F.2d 101, 104–05 (8th Cir. 1942).

Thus, the 1938 Rules created the spurious class action as a permissive joinder device. Professor Moore candidly advocated its use to expand federal subject-matter jurisdiction. Commentators recognized it for what it was. Three federal circuits rejected the effort. A few courts, without analysis, followed Moore. This Court did not rule.

The 1966 Rule 23. The 1966 amendment does away with the true, hybrid, and spurious categories, putting in their place 23(b)(1), (b)(2), and (b)(3), abandoning the opt-in intervention

[4] The first case that adopted Moore's view was *Shipley v. Pittsburgh & L.E.R. Co.*, 70 F. Supp. 870 (W.D. Pa. 1947). It cited *solely* Moore's 1938 work for authority. In return, *Shipley* became the *only* authority cited by Moore's next edition, 3 Moore *Federal Practice* 3477 (2d ed. 1948). *Shipley*, in turn, was used as authority without analysis by *Amen v. Black*, 234 F.2d 12, 16 (10th Cir. 1956).

approach of the 1938 Rule, and replacing it with an opt-out provision applicable to (b)(3) class actions. The issue in this case is whether the 1966 amendment expanded federal subject-matter jurisdiction. Stated in those terms, the answer must be no, for clearly the Rules cannot expand jurisdiction. Fed. R. Civ. P. 82. As applied to class actions, we can have only the same exceptions to the complete diversity requirement of 28 U.S.C. § 1332 that we had before 1938. And, as the history has shown, that was clearly limited to the "true" and "hybrid" class actions that existed before 1938.

However, there is a problem: *dicta* in *Snyder v. Harris*, 394 U.S. 332 (1969). *Snyder*, a class action for money damages for each class member, would not have been a true or hybrid class action before 1966, and certainly not before 1938. The issue was solely whether the named representatives of the class need meet the jurisdictional amount requirement of 28 U.S.C. § 1332. This Court held that each named representative was required to have over $10,000 in controversy. But in *dicta*, Justice Black stated:

> Under current doctrine, if one member of a class is of diverse citizenship from the class opponent, and no non-diverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant .... *See Supreme Tribe of Ben-Hur v. Cauble* .....

394 U.S. at 340. Justice Black failed to note that *Ben-Hur* was a "true" class action, in which control of a *res* was being litigated, while *Snyder* was a suit for damages for each class member. Prior to the instant case, the *Snyder dicta* was the basis of holdings or *dicta* in several circuit and district court cases.[5] At least one court

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[5] *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1129 (2d Cir. 1974) *(dicta); Friedman v. Meyers*, 482 F.2d 435, 436 n.1 (2d Cir. 1973) *(dicta); Caspar v. Cunard Lines*, 560 F.Supp. 240, 242 (E.D. Pa. 1983) *(dicta); Rocket Oil & Gas Co. v. Arkla Explor.*, 435 F. Supp. 1303 (W.D. Okla. 1977); *In re Dalkon Shield IUD Products*, 526 F. Supp. 887, 910 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); *In re Federal Skywalk Cases*, 93 F.R.D. 415, 420 (W.D. Mo.) *vacated on other grounds*, 680 F.2d 1175 (8th Cir. 1982).

has disagreed, rejecting the *Snyder dicta*.[6]

In *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), this Court, building upon the holding of *Snyder*, held that each member of a plaintiff class must meet the jurisdictional amount requirement of Section 1332. This holding led Professor Moore to change his view, so that now he too rejects the *dicta* of *Snyder*:

> In *Zahn* ... the diversity class suit may have been dealt a death blow ... [T]he Court held that the claim of each member of the class must satisfy the jurisdictional amount. Since the claims of the members of a (b)(3)-type class are not within the court's ancillary jurisdiction of the jurisdictional amount requirement, it should follow that they are not ancillary for diversity purposes and the citizenship of each member of the class must be considered.

Moore, *Federal Practice* (Rules Pamphlet), § 23.17, pp. 241–42 (1987).[7]

The Agent Orange Decision. In the instant case, the Court of Appeals held that, in a 23(b)(3) class action, complete diversity is not required between all members of the class and the opposing parties, relying upon the *dicta* in *Snyder*, which it termed "hornbook law." 818 F.2d at 162. (App. p. 710a.) The Second Circuit ignored the distinctions between the "true" class action that existed in *Ben-Hur* and the permissive-joinder type of class action in the instant case. The court also ignored the argument that looking only to the citizenship of the named representatives in the permissive-joinder type of class action, it was working an expansion of federal jurisdiction through changes in the Federal Rules.

The Reason for Granting Certiorari. The instant case represents a marked departure from the heretofore settled doctrine that

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[6] *People v. Hunt Int'l.*, 481 F. Supp. 71 (N.D. Ill. 1979).

[7] Professor Moore goes on: "thus, *Zahn*, *sub silentio*, overruled *Supreme Tribe v. Cauble* .... *Zahn* also cast doubt on the rule that intervention in a class action, over which the court has jurisdiction, does not require independent grounds of federal jurisdiction." *Id.* at 242.

a federal rule may not be used to expand federal jurisdiction beyond that permitted by statute. Complete diversity is a requirement of 28 U.S.C. § 1332. *State Farm*, 386 U.S. 523 (1967). The exceptions are narrow and restricted to those in existence in 1938. That they are not to be expanded or added to has been made very clear by this Court in *Owen Equipment*, 437 U.S. at 377:

> [N]either the convenience of litigants nor considerations of judicial economy can suffice to justify extension of ancillary jurisdiction to plaintiff's cause of action against a citizen of the same state in a diversity case. .... To allow the requirement of complete diversity to be circumvented as it was in this case would simply flout the congressional command.

The holding in the instant case, adopting the *dicta* of *Snyder*, will open up a large area of federal jurisdiction that did not exist before. As many of these cases will be massive, they will deprive state courts of, and place in federal courts, large segments of jurisdiction not intended by Congress. The problem began with Professor Moore. Professor Moore has abandoned his earlier position. But meanwhile that position was placed into the *dicta* of this Court in *Snyder*. As this Court knows, the *dicta* of the Supreme Court of the United States, even when inconsistent with holdings in other cases (here *Zahn* and *Owen Equipment*), has vast impact among the federal courts. It must be the role of this Court to reexamine its own *dicta*, translated into holding in this and other cases cited above.

The facts in this case are illustrative of the charade that results from the holding of the Second Circuit. This case began as 145 individual actions containing some 15,000 named plaintiffs, all transferred to one court under the Multidistrict Litigation Statute. Some contained class action allegations. By the time of the Third Amended Verified Complaint, the lead case complaint contained no diversity allegations. Then it was determined that the case could be brought only under diversity jurisdiction. 635 F.2d at 995. (App. p. 641a) The district court then ruled that each of the 145 complaints were to be deemed amended to add diversity allegations

and, in each complaint, to name only those defendants who were of diverse citizenship from the plaintiffs named in that complaint.

Prior to the January 16, 1984 class-certification order, the trial judge asked for a list of named plaintiffs to be representatives of the class in the certified class action. The PMC named eleven veterans and family members. That the PMC recognized that arbitrarily selecting a few named plaintiffs in order to create diversity is no more than a charade can be seen from the fact that among the eleven there were four who were not diverse from the citizenship of four of the defendants. Through various amendments, the number of named plaintiffs was reduced to four arbitrarily selected from the entire class.

Thus, the case proceeded. It is clear that the case would have proceeded no differently if the names of any four alternative class members had been typed on the later Amended Complaints: it was a charade to satisfy Moore's ploy (since abandoned even by Moore) and the *dicta* of *Snyder*. In spirit, if not in letter, this violates the command of 28 U.S.C. § 1359.

B. The Court of Appeals Expanded Federal Jurisdiction by Permitting a Diversity Class Action to Proceed with Named Plaintiffs Who Were Nondiverse from Defendants

If, *arguendo*, it is to be assumed that in a permissive joinder type of class action, the citizenship of only the class representatives is to be considered, the courts below have still worked an expansion of federal diversity jurisdiction beyond that permitted by previous law. In the process the Court of Appeals has vitiated Fed. R. Civ. P. 54(b).

As described above, the first class action complaint contained 10 named representatives. Three of those 10 were of the same citizenship as three defendants: Michael Ryan and Hooker Chemical, both of New York; Brian Quinn and Riverdale Chemical, both of Illinois; Dan Jordan and Diamond Shamrock, both of Texas.

In February 1982, the trial court granted Hooker's motion for summary judgement, on the ground that Hooker did not manufac-

ture Agent Orange, and therefore was not guilty of the allegations against it. *In re "Agent Orange" Product Liability Litigation*, 534 F.Supp. 1052 (E.D.N.Y. 1982). (App. p. 76a.) As no Rule 54(b) certificate as to Hooker was ever made by the trial judge, the February 1982 order remained interlocutory and Hooker a defendant throughout the subsequent proceedings. On February 17, 1984, after the class-action certification, there is a clerk's docket entry of dismissal of Hooker, referring back to the February 1982 order. However, no "express determination" called for by Rule 54(b) was made. Even if the Rule 54(b) "express determination" had been made in February 1984, the result would be no different, as Michael Ryan and Hooker coexisted as nondiverse parties for one month and then an attempt was made to dispose of the claim against Hooker on its merits.

The trial court granted summary judgment for Riverdale on May 20, 1983. *In re "Agent Orange" Product Liability Litigation*, 565 F.Supp. 1263, 1271 (E.D.N.Y. 1983). (App. p. 120a.) On December 13, 1983, the court ordered the clerk "to enter judgment, forthwith, dismissing action as to deft....Riverdale Chem. Co." No "express determination" under Rule 54(b) was made.

Rule 54(b) provides, in pertinent part, that when the trial court disposes of one or more but fewer than all parties before it, the court may direct the entry of a final judgment" as to those parties disposed of but "only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment." In the absence of that "express determination" and "express direction," the order, "however designated," does not terminate the action as to those parties and the order is interlocutory, "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." *Id.*

This language was not accidental. As adopted in 1938, Rule 54(b) contained no express certification requirement. Wright & Miller, § 2653 at 20. The result was confusion as to what was a final order under that rule. To eliminate this confusion, Rule 54(b) was amended in 1948 to require the "express determination" and

"express direction" now in the rule. *Dickinson v. Mulligan*, 338 U.S. 507, 512 (1950); Wright & Miller, § 2653 at 21. Absent the "express determination" and the "express direction" required by Rule 54(b), an order, "even if it appears to adjudicate a separable portion of the controversy, is interlocutory." Wright & Miller, § 2653 at 38. Thus, express findings are an "essential prerequisite" to finality, *Encoder Communications Inc. v. Telegen, Inc.*, 654 F.2d 198 (2d Cir. 1981); Wright & Miller, § 2653 at 14–16, and the order is subject to revision at any time prior to final judgment in the case. *Republic of China v. American Express Co., Inc.*, 190 F.2d 334, 339 (2d Cir. 1951).

That the district judge in the instant case understood the law exactly this way is clear from his actions. For summary judgment granted to Thompson Chemical Company on May 20, 1983, without a certificate that met the Rule 54(b) requirement, 565 F.Supp. at 1271, was revoked on November 14, 1983. In the instant case, the Court of Appeals disposed of the argument that complete diversity was missing between all representative plaintiffs and Hooker and Riverdale by holding that, "[b]ecause the purpose of the rule is ... only to clarify the appealability of an order, a dismissed defendant who fails to obtain a Rule 54(b) certification does not remain a party of the case for purposes of determining diversity." *In re "Agent Orange" Product Liability Litigation,* 818 F.2d 145, 162-163 (1987). (App. p. 712a.)

The language in Rule 54(b) that, without such a certificate, the order may be revised "at any time before the entry of judgment adjudicating all the claims and the rights and liability of all the parties," is ignored. The fact that the district judge in this case entered summary judgment for one defendant which, in the absence of a proper 54(b) certificate, he later revoked is also ignored.

With much respect, we are left under the holding of the court below with the absurd result that a person is a party in a district court case for appellate jurisdiction purposes (i.e., he may not appeal without a proper Rule 54(b) certificate), but he is not a party for diversity purposes. Moreover, this nonparty (for jurisdictional purposes) may be made a party again by the trial court revising its

earlier interlocutory order. Clearly, the line between final and interlocutory order is clouded, all in an attempt to expand federal diversity jurisdiction. Once again, to preserve the lines drawn by Congress under the law as heretofore understood and under its reasoned application, this Court's intervention is required.

II. THE NOTICE ORDERED IN THIS 23(b)(3) CLASS ACTION DID NOT SATISFY DUE PROCESS OR RULE 23(c); EVEN THE INADEQUATE NOTICE ORDERED WAS NOT CARRIED OUT.

A. The Notice Ordered Did Not Satisfy Due Process and the Notice Requirements of Rule 23(c)

Mullane v. Central Hanover Bank, 339 U.S.306 (1950), sets forth the basic constitutional test for notice that Rule 23(c)(2) picks up for 23(b)(3) class actions: "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Id.* at 314–20. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), applies those principles in a case on all fours with the instant case. *Mullane* and *Phillips Petroleum* require more than was ordered in the instant case.[8]

Mullane involved settlement of an account by the trustee of a common trust fund and the notice to be given to the fund's beneficiaries. Every claim that the beneficiaries would otherwise have against the trustee for improper management of the common fund during the period covered would be "wholly terminated by the decree" to be entered. 339 U.S. at 311. The notice given, this

[8] The PMC admitted that class certification notice was defective. Thomas Henderson, a member of the PMC, told the district court: "There were, I believe, at least seven significant factors which bore on our decision to settle this case .... The seven problems were the propriety of the class notice, having sent out approximately 170 odd thousand notices to perhaps as many as 2.4 million class members, with some of the possible technical deficiencies in the timing of the mailing of notices as the Court has pointed out from time to time." We submit that settling a class action because class counsel gave inadequate notice is both improper and a clear violation of due process and Rule 23(c) (2).

Court held, must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" and to afford them an opportunity to be heard. *Id.* at 314. But the particular type of notice constitutionally required varies "with due regard for the practicalities and peculiarities of the case ...." *Id.*

The circumstances emphasized in *Mullane* are crucial to an understanding of the application of the *Mullane* standard to this case:

> The individual interest [of any one beneficiary] does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interest of all, since any objection sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable.

Id. at 319.

That is not this case. Here every claimant has an individual claim of his own. No claimant will put forward a fight for the claims of those absent. At the end of the case, those claimants who are victorious will claim their own without concern for those who received no notice. And, of course, no claimant before the court would or could exercise the opt-out right provided by Rule 23(c)(2) on behalf of absent class members, including those who received no notice.[9] Thus, in this narrow, but very important regard, a crucial ingredient of *Mullane* is missing: "the notice" that reached some, "is [not] likely to safeguard the interest of all"; the "rights of each ... are [not] shared by many other[s]." 339 U.S. at 319.

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[9] "[M]embers of the class in (b) (3) actions must be given the option of excluding themselves form the class and from any ensuing judgment." *In re Glenn W. Turner Enterprises, Ltd.*, 521 F.2d 775, 781 (3d Cir. 1975). This requirement has been held to have a constitutional basis. *DeGier v. McDonald's Corp.*, 76 F.R.D. 125 (N.D. Cal. 1977).

For reasons developed *infra*, the record in this case is replete with the names of claimants who did not in fact receive notice before the opt-out period expired and, indeed, of claimants who were not even aware of their injuries until after that date. Those persons could not opt-out if they had wanted to; their option was completely foreclosed. And no one before the court could exercise this right for them.

Because this is not *Mullane*, the notice requirement itself must be different. Where there is not the identity of interest that existed in *Mullane*, nothing short of actual notice to a person who is or with due diligence knows that he has been injured will suffice. And that actual notice must give sufficient time to exercise all rights, including the right to opt-out.[10]

Rule 23(c)(2) embodies the language and the concept of *Mullane*. But due process and Rule 23(c)(2) interests can be protected only if each member of the class receives notice that is sufficiently clear and in sufficient time to permit an intelligent decision on whether to opt-out of the class action or to remain in and be bound by the result:

> The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected ... or, whether conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring notice than other of the feasible and customary substitutes.

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[10] There are cases that provide for less than actual notice. We submit, they are based upon a rote repetition of the language of the Rule and of *Mullane* without any hard analysis whether the peculiar circumstances are the same as those in *Mullane*. As far as they hold that the particular notice method of *Mullane* is applicable to all circumstances, no matter how different from those of *Mullane*, we respectfully urge they are wrong. Due process requires more.

Mullane, 339 U.S. at 315. Publication in newspapers may provide unidentified class members notice. But this Court has made clear that "[n]otice by publication is a poor and sometimes hopeless substitute for actual service of notice," and that "[i]ts justification is difficult at best." *Schroeder v. City of New York,* 371 U.S. 208, 213 (1962).

The holdings of the courts below concerning notice run directly contrary to *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). In *Phillips,* this Court applied *Mullane* to an action for money damages on behalf of a plaintiff class where many members of the class were not appearing voluntarily.[11] First, this Court held that due process required that the members of that class "*must receive notice* plus an opportunity to be heard and participate in the litigation." *Id.* at 812 (emphasis added). Second, "The notice should describe the action and the plaintiff's rights in it." *Id.* Third, due process was held to require "at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the court." *Id.* Finally, due process required that "the named plaintiff at all times adequately represent the interests of the absent class members." *Id.*

None of those requirements were met in this case. The class representatives failed to identify class members who could have been identified through a reasonable effort. Written individual notice was not sent to 177,496 class members whose names and addresses were in the hands of the class representatives. Clearly, they did not "receive" notice, as is required by *Phillips*. Further, many class members received notice *after* the time to opt-out expired – thus, effectively depriving them of the right to opt-out. Manifestly, the bare "minimum" requirement of due process "that an absent plaintiff be provided with an opportunity to remove himself from the class," *Phillips*, 472 U.S. at 812, was not met.

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[11] This Court limited its holding in *Phillips* to a class action seeking money damages on behalf of class members. 474 U.S. at 811-12, n.3. That, of course, *is* the instant case.

Another important consideration is the widespread dispersion of these class members throughout the United States, Puerto Rico, and in Australia and New Zealand. They came from every type of background. The only factor that they had in common was that they were all veterans of Vietnam service or related to veterans who had served there. They were part of a larger group, consisting of some 2,400,000 who had performed such service. The United States government had the names and addresses of a high percentage of the 2,400,000, but otherwise a comprehensive list did not exist.

The most certain method of reaching all or almost all class members was to send a letter to each person who had served in Vietnam during the critical years. The court's order in this case fell far short of that mark. The court ordered notice to be mailed to each of the following persons:

> (a) Each plaintiff or intervenor in the cases before the court, some 14–15,000 persons, plus any person represented by a counsel on the PMC who was not a named party.
> (b) Each person on the Veterans Administration registry who had complained of an Agent Orange related ailment, some 89,000 persons.
> (c) Each state governor, asking that the notice be sent to any person known to a state agency who may be a member of the class and inviting each governor to supply the court with a list of names and addresses so that notice could be mailed to those persons by the PMC.

597 F. Supp. at 756. (App. p. 165a.) In addition, the court ordered publication:

> (d) Once a week for two successive weeks (or, if the publication is monthly, then once) in: *USA Today; New York Times* (national edition); *Time Magazine*; the ten largest circulation newspapers in Australia; the five largest daily circulation newspapers in New Zealand; *American Legion Magazine*; *VFW Magazine*; *Air Force Times; Army Times; Navy Times;* the *Leatherneck*.

Id. Notices were also to be sent to television and radio networks and to radio stations with a combined coverage of at least 50% of the listener audience in each of the top 100 radio markets in the United States, asking for free, public service announcements.

This litany is just not designed to reach all or even almost all of the class members. Limiting the print notice to these three publications is far from a demonstration of seriousness. It is common knowledge that vast numbers of the members of this class — in common with the vast majority of Americans — do not read the *New York Times* (national edition), *USA Today,* or *Time Magazine*, and vast numbers of them do not belong to the old-line veterans groups so as to receive the two veterans magazines listed. To limit the print notice to these publications was to guarantee the futility of result. And limiting the radio and television broadcasts to public service announcements ensured a lack of effectiveness.

B. The Notice Ordered Was Not Given and the Time Contemplated Was Not There

Even the inadequate notice ordered was not given before the May 1, 1984 opt-out deadline:

1. *New York Times* (national edition) — no notice prior to May 1, 1984. However, *New York Times* (local edition), notice appeared once, April 17, 1984.
2. *USA Today* — no notice appeared prior to May 1, 1984.
3. *Time Magazine* — no notice appeared prior to May 1, 1984.
4. *American Legion Magazine, VFW Magazine, Army Times, Navy Times, Air Force Times, The Leatherneck* — no notice appeared prior to May 1, 1984.
5. Television and radio networks — the record contains no certificates showing any broadcast and none is known to counsel.
6. Radio stations: of approximately 9,000 radio stations in the United States, the record contains certificates showing broadcasts by 37 radio stations. Of those, only

> 4 were among the top 10 in coverage in their respective geographic regions. Broadcasts occured in only 22 of the 100 *major* radio markets.

The mailed notice was also not carried out as ordered. 187,600 notices were mailed. 57,000 were returned undelivered. The notices to the governors received a varying response.

These facts speak for themselves. The court's order for publication was not carried out. That in itself is a sufficient denial of due process and the rights under Rule 23(c)(2). And those denials deprived class members of important rights recognized in *Mullane* that could not be claimed because notice was not given. Those denials cannot be justified on the ground of efficiency.

C. Individual Notice to Identifiable Class Members Was Required and Was Feasible

Rule 23(c)(2) requires that 23(b)(3) class members be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." This Court has made it clear that "[i]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is rather, an unambiguous requirement to Rule 23." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) ("*Eisen IV*").[12] Moreover, this Court in *Phillips* made clear that due process requires that members of a plaintiffs' class action for money damages "receive" this notice. *Phillips*, 472 U.S. at 812.

In re Nissan Motor Corp. Antitrust Lit., 552 F.2d 1088, 1098–99 (5th Cir. 1977), describes "reasonable efforts":

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[12] In *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979), a class action involving DES claims, the court concluded that due process required "actual receipt of notice before a judgment may bind class members," because [t]he stakes in this action are high. Women who do opt-out will be bound by the judgment that results. Class members who later develop cancer may be barred by the judgment in this action from seeking compensation for their subsequent injury." *Id.* at 393.

> [S]ubdivision (c)(2)'s reasonable effort standard requires that, once a 23 (b)(3) action has been certified, the name and last known address of each class member known to the parties or capable of being identified from business or public records available to them must be produced. The source or sources providing the greatest number of names and addresses must be used.[13]

The responsibility of identifying absentee class members and paying the cost of their individual notice is that of the representative plaintiffs. *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 356 (1978); *Nissan*, 552 F.2d at 1102. A class action must be dismissed where the representative plaintiffs are unwilling or unable to undertake the identification and notice process and to bear the cost. *Eisen IV*, 417 U.S. at 179. As this Court said in Eisen, "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Id.* at 176.

The best source of names and address of those injured through Agent Orange exposure is the list of those who served in Vietnam. All parties below agreed on that fact. That list was in the hands of the federal government. The class representatives could have obtained that list by its own efforts or by reimbursing the Government for the cost of furnishing the list. The fact is that it was feasible to identify all, or most of, the 2,400,000 persons who had served in Vietnam. That it would have taken effort and expense on the part of the class representatives is no excuse. Due process and Rule 23(c)(2) require no less. *See Phillips; Eisen IV; Nissan.*

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[13] The representative plaintiffs in *Nissan* were required to review *manually* 1,700,000 "retail delivery report cards" to obtain the names and last known addresses of approximately 371,000 persons who had purchased motor vehicles. "A large class requires a large effort . . . . While the mechanical process of examining [1,700,000 RDR cards] may prove to be expensive and time consuming, the individual right of absentee class members to due process makes the cost and effort reasonable." *Id.* at 1100; *see also Eisen IV*, 417 U.S. at 179; *In re Franklin Nat'l Bank Sec. Litig.* 574 F.2d 662, *modified on other grounds*, 599 F.2d 1109 (2d Cir. 1978).

Even more egregious, names and addresses of class members furnished to the class representatives were not used. At the request of the trial court. Massachusetts furnished some 157,496 names; no notices were mailed to those persons. West Virginia furnished 28,000 names; no notices were mailed to 20,000 of those persons. Moreover, one-third of all notices actually sent were returned undelivered. The reasons were many: computer gliches, old addresses, etc. When those errors were discovered, the class representative failed to correct them, and tens of thousands of class members received no notice.

The class representatives' inability to carry out the fundamental due-process burden placed on them demonstrates the inadequacy of their representation of absent members and requires decertification of the class. *See Eisen IV; Nissan; Oppenheimer.*

D. The Decision of the Court of Appeals

The Court of Appeals noted that 240,000 claims had been filed to conclude that the notice was adequate. 818 F.2d at 169. (App. p. 727a). Moreover, the court found that the trial judge acted within his discretion in not ordering that notice be sent to the 2,400,000 names possessed by the Department of Defense, names and addresses that could have been obtained through the expenditure of time and money. *Id.* (App. p. 726-27a). The appellate court held that the 2,400,000 names was unnecessary, since that list included names of Vietnam veterans who had not been exposed to Agent Orange. *Id.* Finally, the court held that since the interests of all veterans in the facts and law going to the military-contractor defense were identical, "the class members with actual notice . . . would have represented the interests of the class members unaware of the action." *Id.* at 168-169 (App. p. 726a).

The court held it to be immaterial that the trial court's order on notice was not followed. *Id.* at 169 (App. p. 728a). That a "large number of mailed notices were returned undelivered ... must be regarded as inevitable ... in litigation of this sort." *Id.* The court also recognized that class counsel had failed to carry out the trial judge's order concerning publication and broadcast notice, but held

this to be a "clerical error . . . of little consequence in light of the actual notice and widespread publicity" that the case received. *Id.*

E. Further Reasons for This Court to Grant Review

Once again, the appellate court permits a clear violation of settled law on the ground that in this massive case it really does not matter. The appellate court looks to the fact that 240,000 claims were actually filed — without noting that the vast majority were filed *after* the opt-out period had expired and publicity was given to the $180,000,000 settlement. The appellate court overlooks the fact that actual notices were not sent to several tens of thousands of names and addresses in the hands of class counsel and that when 57,000 notices were returned undelivered no attempt whatsoever was made to remedy the situation. The court finds acceptable that there were some 130,000 notices sent out and not returned while the class counsel had in hand some 177,500 other names and addresses to whom no notice was sent. The appellate court excuses the failure to furnish publication notice as a "clerical misunderstanding." *Id.* at 169 (App. p. 728a). While the court judicially notes the publicity received for this case, it fails to differentiate how much of that publicity was after the settlement. It also fails to focus on the evidence before it of many persons who did not receive notice until after the opt-out period expired.

Thus, once again, the appellate court has acted on the basis of efficiency. In this massive case, due process, the requirements of Rule 23(c)(2), the law as laid down in *Mullane* and *Phillips Petroleum* must bow to efficiency. The fact that many tens of thousands of claims were wiped out without any notice was immaterial to the court of appeals. Perhaps the most telling statement was the appellate court's declaration that "given the great doubt as to whether anyone at all was injured by Agent Orange," it did not matter who, if anyone, received notice. 818 F.2d at 169. We respectfully suggest that this is a notion of due process foreign to our legal system and one which, if uncorrected by this Court, can expect to receive increased credence in future cases that prove troublesome to the efficient operation of the courts. Moreover, the

holding of the courts below that class counsel does not have the obligation to proceed with notifying a large group of individual names that exists and can be accessed with time and money is in direct conflict with the ruling of the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088 (5th Cir. 1977).

III. THE EXERCISE OF JURISDICTION OVER INDIVIDUAL CLAIMS FROM THROUGHOUT THE COUNTRY, AND EVEN BEYOND OUR SOVEREIGN BOUNDARIES, VIOLATES DUE PROCESS AND THE POWER OF THE COURT AS GRANTED BY CONGRESS WHERE THE INDIVIDUAL CLAIMANTS HAVE NO CONTACT WITH THE FORUM STATE.

Due process requirements for the exercise of judicial power over an unwilling party were laid down in *Pennoyer v. Neff*, 95 U.S. 714 (1877), and put into their current form in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). As this Court made clear in *Phillips Petroleum*, "the requirement that a court have personal jurisdiction comes from the Due Process Clause's protection of the defendant's personal liberty interest ...." 472 U.S. at 807.

While the personal jurisdiction principles are generally considered in terms of a defendant who does not desire to be sued in a particular location, this Court in *Phillips* made clear that they apply equally to involuntary class-action plaintiffs.

The instant case arose in a federal court and the *International Shoe* principles were generally developed in cases arising in state court. However, they have been equally applied in cases arising in federal court. *See, e.g., Burger King v. Rudzewicz*, 471 U.S. 462 (1985). Moreover, the liberty interest of the Due Process Clause underpinning personal jurisdiction, *see Phillips*, 472 U.S. at 807, apply in federal as well as in state court. Thus, all of the considerations of "traditional notions of fair play and substantial justice" that permeate *International Shoe* and its progeny and that underlie the requirements laid down in *Phillips* for involuntary plaintiff class actions are as applicable in federal court as in state court.

See also Arrowsmith v. United Press Int'l., 320 F.2d 219 (2d Cir. 1963).

In the instant case, the exercise of personal jurisdiction over involuntary plaintiffs without the protections that *Phillips* sets down "as a minimum" flies in the face of this Court's holding. *Phillips* was argued to the Court of Appeals below and ignored. Further review by this Court is called for.

Moreover, the actions of the courts below invade an area in which Congress has been the prime actor. In every instance in which nationwide personal jurisdiction exists, it is provided by an Act of Congress.[14] The only example of federal court personal jurisdiction over an unwilling party outside of the state in which the federal court is sitting, in the absence of statute, is the very limited 100-mile bulge provision of Rule 4(f).

In the instant case, the Court of Appeals rejected the personal jurisdiction argument. The appellate court recognized the truism that Congress has the authority to legislate nationwide jurisdiction for the federal courts. *See Mississippi Publishing Corp. v. Murphree*,326 U.S. 438, 442 (1946). The appellate court then pointed to the Multidistrict Litigation Statute, 28 U.S.C. § 1407, as a statute that authorized nationwide jurisdiction in this case.

The appellate court's reasoning does not make sense. Clearly, cases already properly filed in federal court may be gathered in one federal district under Section 1407. But that statute does not purport to authorize gathering into a class action an involuntary plaintiff who filed a case in state court, who has not yet filed a case, or whose injury has not yet manifested itself.

Once again, it must be recognized that prior to 1966 this case could not have been brought. The pre-1966 class action rule provided for opt-in plaintiffs with individual claims. Thus, the involuntary plaintiff could not have been swept across country into a class action that would determine his individual claim without his consent. It is only the restructuring of Rule 23 in 1966 that made

[14] *E.g.*, Investment Company Act, 15 U.S.C. § 80a–43 and The Interpleader Act, 28 U.S.C. § 2361; 28 U.S.C. § 1655.

this case possible. Nowhere does the Advisory Committee note an intent to sweep away previous limitations on the exercise of personal jurisdiction. Nor is there discussion of whether Congress delegated to the courts the power to do what Congress had always done before: create nationwide personal jurisdiction.

Thus, it is manifest that the action of the courts below in exercising personal jurisdiction over the claims of individuals thousands of miles away, without any semblance of contact with New York, is a usurpation of power not authorized by Rule 23 or by Rule 4(f). As far as Rule 23 may be read to go that far, it falls outside of the rule-making power. While the result may be efficient, it is a usurpation of Congressional power.

CONCLUSION

In reaching an efficient result to a very difficult problem, the courts below swept aside significant restrictions on the power of federal courts, ignored holdings of this Court, and made a mockery of due process principles. While the case in many ways is *sui generis*, the principles are not. With the *impermatur* of the United States Court of Appeals for the Second Circuit behind them in this highly visible case, the holdings of the instant case can be expected to be followed, with minimum analysis, by other courts seeking an efficient result. Thus, we respectfully urge, further review by this Court is essential and the Petition should be granted.

Dated: Washington, D.C.
Sept. 15, 1987

Respectfully submitted,

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STATUTORY AND RULE APPENDIX

§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States:

(2) citizens of a State, and citizens and subjects of a foreign state;

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties;

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States," as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

§1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrail depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(1) the judicial panel on multidistrict litigation upon its own initiative, or

(2) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review or an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Anti-trust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

Rule 4. Process

. . . .

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized

by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragrpahs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be

dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicably after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The

notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the occur may direct to some or all members of any step in the action, or of the proposed extent of the judgement, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with

similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§1391-93.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.

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No. 87-437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD PINKNEY, et al.,

Petitioners,

v.

DOW CHEMICAL COMPANY, et al.,

Respondents.

In re "Agent Orange" Product Liability Litigation

BRIEF OF AGENT ORANGE PLAINTIFFS' MANAGEMENT COMMITTEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PARTIES

Respondents are members of the class who are represented by court-appointed lead counsel to the class, designated in the courts below as the Plaintiffs' Management Committee ("PMC"). As of October 1, 1987, 248,515 individual members of the class have made claims against the settlement fund. To avoid burdening this Court and its staff with the citation of 248,515 names, Mr. George Ewalt, who was one of the named representative plaintiffs in the courts below, has been designated as the named respondent for purposes of Rule 28.1.

This brief filed by the PMC is related to the Pinkney petition only. The various petitions for certiorari arising out of the Agent Orange litigation are unrelated to each other and should be separately considered.

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PRELIMINARY STATEMENT

On May 7, 1984, facing formidable legal and factual obstacles, duly appointed counsel for the class agreed to settle the Agent Orange litigation for $180,000,000.00, subject to court approval. As of that day, no veteran, or lawyer for any veteran, had opposed class certification or jurisdiction of the federal court. All attorneys for veteran class members, including counsel for petitioner, had urged that the claims proceed in the class action context.

As of September 30, 1987, the District Court held $227,693,285.76 on deposit in the fund for the benefit of eligible class members. This fund is the only source of life improving benefits for class members.

In approving the settlement, Chief Judge Jack B. Weinstein of the Eastern District of New York rendered an opinion which properly weighed and determined factual and legal matters which bore upon the propriety of the settlement. Factual and legal problems, each potentially dispositive of all of the veterans' claims, were carefully and exhaustively weighed in the trial court's lengthy opinion approving the settlement. 597 F. Supp. 740, 775-851.

The Court of Appeals for the Second Circuit decided that objections to the settlement on grounds pertaining to jurisdiction and notice were meritless. The court affirmed Judge Weinstein's opinion, finding "compelling" reasons why the settlement was and is a totally appropriate resolution of the case. Petitions for *en banc* rehearing were unanimously denied by each justice of the Second Circuit on June 5, 1987.

Petitioner is urging the Court to overrule more than 66 years of established authority relating to principles of diversity jurisdiction and established authority relating to notice requirements in class actions. The petition wholly disregards the Supreme Court's settled practice of reviewing judgments, not statements in opinions. It also ignores this Court's settled practice of accepting factual determinations in which the District Court and the Court of Appeals have concurred.

STATUTES AND RULES INVOLVED

28 U.S.C. Rule 17.1 (1984)

17. Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

28 U.S.C. §1332

§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 U.S.C.S. §1603(a)], as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title [28 U.S.C.S. §1441], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principle place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Fed. R. Civ. P. 54(b)

Rule 54. Judgments; Costs

* * *

(b) Judgments upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 23(c)(2)

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

* * *

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that

(A) the court will exclude him from the class if he so requests by a specified date;

(B) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

THE ONLY JUDGMENT ARGUABLY REVIEWABLE BY THIS COURT IS THE JUDGMENT AFFIRMING APPROVAL OF THE SETTLEMENT. THE PETITION DOES NOT SEEK REVIEW OF THAT JUDGMENT.

The social and moral issues which made this litigation into an emotionally charged and highly visible case were, and continue to be, issues which are vitally important to the Vietnam veterans whose lives may have been affected by Agent Orange. However, those issues are not before this Court on the petition for certiorari. The case was settled and the legal and factual issues which created headlines were never tried.

Regardless of the publicity received by the causes, the settlement of the litigation involves no issue which merits Supreme Court review. There are no "special and compelling" reasons for the settlement to be reviewed by this Court. *See* 28 U.S.C. Rule 17.1 (1984).

The petition asks that certiorari be granted to review issues concerning federal jurisdiction and class notice and that the class be decertified and the settlement vacated. However, it is the established practice of this Court to review "judgments, not statements in opinions." *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 734 (1978). This rule is especially applicable where, as here, petitioner purports to raise constitutional issues with respect to such statements. *Id.* This Court may avoid the unnecessary resolution of such issues.

Petitioner is not seeking review of an order certifying a class, approving class notice or finding jurisdiction over

any individual class member. Petitioner does not seek to review the fairness of the settlement. Although the Court of Appeals upheld the validity of the district court's jurisdiction and the propriety of the class notice in its judgment affirming the approval of the settlement, resolution of those issues was not essential to that judgment. In all class action settlements, the primary factor in determining whether the settlement should be approved is the relative strength of the claims of the plaintiffs. The judgment below is limited to approval of the settlement, and the grant of certiorari to review the matters raised by petitioner would be improper under *F.C.C. v. Pacifica Foundation.*

II.

THE PETITION DOES NOT PRESENT ANY REAL CASE OR CONTROVERSY. NO VETERAN HAS BEEN IDENTIFIED AS DESIRING TO VACATE THE SETTLEMENT OR AS HAVING STANDING TO SEEK SUCH RELIEF.

The petition states that Mr. Pinkney "has been chosen as the named party since he is typical of those class members who objected to class certification." (Petition, p. iii.) This statement alone demonstrates that no actual case or controversy is presented to this Court:

- The petition does not claim that petitioner's residence is not diverse from one or more defendants. Thus, he has no standing to make the personal jurisdiction arguments contained in the Petition. Petitioner's Agent Orange claim form states he is a resident of Baltimore, Maryland. None of the defendants are Maryland residents.
- The petition does not claim that petitioner did not receive notice; thus he has no standing to raise objections to notice.

— Neither Mr. Pinkney, nor any other named veteran, is described as objecting to the settlement, which is far different from objecting to class certification; thus, petitioner has no standing to raise objections to the settlement in this petition.

Even assuming *arguendo* that objections to class certification are relevant to the petition, the District Court's docket reveals no objection by Mr. Pinkney or any plaintiff to certification at any time prior to the settlement. Petitioner's counsel, Ashcraft & Gerel, were of record *urging* class certification in actions they filed which were jurisdictionally premised upon diversity of citizenship. It was not until after the settlement was reached that Ashcraft & Gerel first objected to class certification.

Without alleging that the trial court did not have personal jurisdiction over him, or that he did not receive notice, petitioner alone "assumes the risk" that the settlement will be vacated and all claims will be dismissed on summary judgment upon remand. His individual claims concerning personal jurisdiction and notice are not valid grounds for vacating a quarter-billion dollar fund which stands ready for distribution to the class members.

III.

THE FACTS OF THE CASE ARE UNIQUE, AND THE LEGAL MATTERS CONCERNING SETTLEMENT ARE NOT. NEITHER RAISES ISSUES APPROPRIATE FOR SUPREME COURT REVIEW.

After May 7, 1984, this litigation was reduced to a single ultimate issue: should the settlement be approved? The factual considerations underlying that single issue have been uniformly viewed as unique. *See* 818 F.2d 145, 148; 597 F. Supp. 740, 746; Petition, p. 5. The *sui generis* nature of the case militates against Supreme Court re-

view, as unique factual situations are unlikely to have precedential value.

Conversely, the legal theories applied to the judgments approving the settlement are as well-settled as the facts are unique. Standards to determine fairness of class settlements are not disputed. *See* 597 F. Supp. 740, 758-64. No circuit conflicts with another. No appellant, including petitioner, ever contended they were not fully complied with by Courts below.

The petition facially reveals that settlement of this case involves no federal issue. Claims against the manufacturers do not arise under the Constitution, any federal statute, or federal common law. *Cf.* 28 U.S.C. Rule 17.1 (1984). Indeed, the Second Circuit has determined there to be no identifiable federal policy at stake in this litigation. *See* 635 F.2d 987, 993-5 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1980).

In sum, the lower courts recognize this to be a settlement of essentially private litigation between private parties. No Supreme Court intervention is necessary to review the application of settled law to unique facts.

IV.

THE COURT PROPERLY EXERCISED DIVERSITY JURISDICTION OVER THE AGENT ORANGE CLASS ACTION.

The petitioner is asking this Court, as appellants did in the court below, to turn its back on over 60 years of clear precedent and to ignore the acknowledged policies upon which that precedent is based. Petitioner urges a novel interpretation of 28 U.S.C. §1332 which neither Congress nor any federal court shares, and which neither petitioner himself nor any plaintiff ever brought to the attention of the trial court.

The representative party diversity rule (i.e. in class actions, diversity is to be measured by reference to the citizenship of the named class representatives only) was first announced 66 years ago in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), and it has been accepted by the entire federal judiciary as applicable to every form of modern action.* This rule is of continued vitality in this Court, *see Snyder v. Harris*, 394 U.S. 332 (1969), and was recently reaffirmed by the Second Circuit in *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1129 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975).

The federal judiciary has consistently held that minimal diversity in class actions is entirely in accord with Article III of the United States Constitution. *See, e.g., State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 531 (1967) and the citations at n. 7; *Twentieth Century-Fox Film Corp. v. Taylor*, 239 F. Supp. 913, 918-21 (S.D.N.Y. 1965).

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* *In re Federal Skywalk Cases*, 93 F.R.D. 415, 420 (W.D. Mo. 1982), *vacated on other grounds*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 459 U.S. 988 (1982) ("In the context of a class action, only the citizenship of the named parties is relevant to the determination of jurisdiction."); *In re "Dalkon Shield" IUD Products Liability Litigation*, 526 F. Supp. 887, 910 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) ("In a class suit, diversity is determined only by the citizenship of the named representatives."); *Casper v. Cunard Line, Ltd.*, 560 F. Supp. 240, 242 (E.D. Pa. 1983); *Esler v. Northrop Corp.*, 86 F.R.D. 20, 28 (W.D. Mo. 1979); *Illinois ex rel., Scott v. Hunt Int'l. Resources Corp.*, 481 F. Supp. 71, 73-74 (N.D. Ill. 1979); *Rocket Oil & Gas Co. v. Arkla Exploration Co.*, 435 F. Supp. 1303, 1304-05 (W.D. Okla. 1977); *Friedman v. Meyers*, 482 F.2d 435, 436, n.1 (2d Cir. 1973); *Mason v. American Express Co.*, 334 F.2d 392, 402 (2d Cir. 1964). *See also Schomber v. Jewel Companies, Inc.*, 614 F. Supp. 210, 215 (N.D. Ill. 1985); *Lumbermen's Underwriting Alliance v. Mobil Oil Corp.*, 612 F. Supp. 1166, 1168, n. 2 (D. Idaho 1985). *Pirrone v. North Hotel Associates*, 108 F.R.D. 78, 84, n. 2 (E.D. Pa. 1985); *McMahon Books, Inc. v. Willow Grove Associates*, 108 F.R.D. 32, 40, n. 5 (E.D. Pa. 1985).

In the instant case, the Court of Appeals readily acknowledged this well-established line of precedent in rejecting petitioner's argument. 818 F.2d at 162.

Petitioners contend that despite the fact that allegedly non-diverse defendants Hooker and Riverdale were dismissed from the case, they remained in the litigation for purposes of determining diversity jurisdiction because no Rule 54(b) certifications of dismissal were issued to them.

The Court of Appeals held that the purpose of Rule 54(b) is only to clarify the appealability of an order, citing *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 512 (1950). Because that is the sole purpose of Rule 54(b), a dismissed defendant who does not obtain a certification under this rule does not remain a party to the litigation for purposes of determining diversity.

Even assuming, *arguendo*, that the claims against Hooker and Riverdale could have been revived by the trial court, diversity jurisdiction is not defeated. Many events permitted by federal procedure could have served to defeat diversity jurisdiction if they had occurred, such as amending the complaint to add a named non-diverse party. The existence of this technical "possibility" does not in itself defeat diversity jurisdiction.

Furthermore, as the Court of Appeals noted, petitioner's argument with respect to Diamond Shamrock's citizenship is also without merit. When this suit was filed, Diamond Shamrock's principal place of business was in Ohio. It later moved to Texas, the domicile of named plaintiff Dan Jordan. However, as this Court has held, this subsequent relocation is irrelevant for diversity purposes. *Smith v. Sperling*, 354 U.S. 91, 93, n. 1 (1957) ("Jurisdiction, once attached, is not impaired by a party's later change of domicile.").

The jurisdictional basis of the Agent Orange class action is, therefore, in complete conformity with long-established law.

V.

THE NOTICE ORDERED AND GIVEN IN THIS CLASS ACTION SATISFIED ALL APPLICABLE AUTHORITIES; THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

Petitioner has restated, almost *verbatim*, the contentions made in the Court of Appeals. In so doing, the petition again fails to show any conflict among the circuits, any compelling reason why this case should be the subject matter of Supreme Court review, or even any error on the part of either the District Court or the Second Circuit Court of Appeals.

The Circuit Court of Appeals decided the merits of the notice arguments using the proper "abuse of discretion" standard of review. The petition, however, asks this Court to again review the same questions in the same context.* It cites no appropriate reason why the Supreme Court should become involved in such a rehearing. In effect, the request is that the Supreme Court impermissibly allow itself to become a fact-finder, substituting its judgment for that of the District Court, which properly exercised that function.

The District Court and Court of Appeals concurred that the notice required by Rule 23(c)(2) was, under *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974), the "best prac-

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* This Court denied certiorari on an identical notice issue in a previous appeal in this case. *In re "Agent Orange" Product Liability Litigation sub nom. In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

ticable" under the circumstances and that the notice given provided individual notice to all members of the class who could be identified through "reasonable efforts". 597 F. Supp. 740, 763; 818 F.2d 145, 169.

The Court of Appeals weighed each of the arguments made by petitioner here and, under its correct standard of review ("whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion", 818 F.2d 145, 168), held that the District Court "adopted a creative approach appropriate to this unique case." *Id.*, at 167. The Court further held that the notice given met the requirements of Rule 23(c)(2). *Id.*, at 168.

Further, the Court of Appeals stated that the requirements urged by appellants (petitioner here) would have been "considerably overbroad" without assurance that suggested alternate lists could have been compiled through "reasonable efforts". The Court noted that the objectors had conceded there was no list that reasonably could have been compiled. 818 F.2d 145, 169.

Under all of the circumstances here, it was clear to the Court of Appeals that "no practical problem exists as to the adequacy of the notice", that there existed "no feasible alternative to the notice plan adopted by the district court", and that "under such circumstances it is inappropriate to second-guess a district court's class notice procedure". The court concluded that "the notice plan . . . was fully adequate under the circumstances." 818 F.2d 145, at 169.

Petitioner is fundamentally asking this Court to second guess the notice plan and impose its discretion on the facts of this case. There is no suggestion of conflict in the Circuits on these issues. There is also no suggestion

that the courts below did not recognize the applicable standards and comport their judgments within them. There is only the wish that this Court impermissibly re-visit the facts and impose a different discretionary result applying the same non-conflicting standards.

Such considerations are not appropriate for Supreme Court review. The request ignores *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 734 (1978), which reiterated the Supreme Court's "settled practice of reviewing judgments, not statements in opinions." It is likewise violative of the settled practice of accepting factual determinations in which the District Court and the Court of Appeals have concurred. *Branti v. Finkel*, 445 U.S. 507, 512, n. 6 (1980). In such cases it is clearly the rule that certiorari should be denied.

VI.

THERE SHOULD BE NO FURTHER DELAY IN DISTRIBUTION OF THE SETTLEMENT TO THE VETERANS DESPERATELY IN NEED.

By any measure, the settlement fund—now approaching a quarter of a billion dollars—confers substantial, life changing benefits upon thousands of our nation's veterans.

Measuring it in legal terms, the courts below have uniformly agreed that it constitutes a fair and reasonable resolution of the litigation under circumstances where there was no practicable alternative. By reason of legal obstacles noted throughout both lower courts' opinions, this recovery has been viewed as substantially more than the class members were likely to recover through trial of the case.

The district court's distribution plan provides substantial cash payments to disabled veterans and survivors of

deceased veterans. It also provides for the establishment and distribution of a wide range of services and help to veterans and their families. At this point the distribution has been delayed for nearly 3½ years since the settlement was reached. Almost all of the actual delay may be attributed to the actions of appellants and petitioner.

This Court will recognize that the single named petitioner does not voice any proper ground for the grant of certiorari, but, perhaps even more importantly, he does not voice the sentiment of the remainder of the class members. They are the ones most cruelly affected by delay in distribution.

Although the settlement finally brings an end to the controversy, it also represents a beginning. As a veteran most eloquently stated at one of the fairness hearings:

> We see the settlement as a positive step in the right direction in obtaining help for the veterans. We really don't want to go through five more years of litigation. We want an end—an end to the legal controversy. Our fight now should be in the medical community and the scientific community in getting more help. And we feel this settlement can be a catalyst for that.

The only obstacle to distribution of the settlement is this petition for certiorari. There is no valid reason for this Court to allow further delay.

CONCLUSION

For the reasons stated, and upon the authorities cited, these respondents respectfully request that the petition for writ of certiorari be denied in its entirety.

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No. 87-437

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RICHARD PINKNEY, *et al.*,
Petitioners,

v.

DOW CHEMICAL COMPANY, *et al.*,
Respondents.

In re "Agent Orange"
Product Liability Litigation

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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List of Parties

A list of the parties to the proceeding below, pursuant to Rule 34.2, includes the members of the plaintiff class and The Dow Chemical Company, Monsanto Company, Hercules Incorporated, Diamond Shamrock Chemicals Company, T H Agriculture & Nutrition Company, Inc., Thompson Chemicals Corporation, and Uniroyal Incorporated.

For the listing required by Rule 28.1 of all parent companies, subsidiaries, and affiliates of each of the corporations, the Court is respectfully referred to the List of Parties set forth in the Brief in Opposition filed by Respondents The Dow Chemical Company, *et al.*, in the related case of *Krupkin* v. *Dow Chemical Co.*, No. 87-620.

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IN THE

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RICHARD PINKNEY, *et al.*,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Statement of the Case

The petition seeks review of the decision of the United States Court of Appeals for the Second Circuit, (App. 676a),[1] which affirmed the class-action settlement of the "Agent Orange" litigation.

After more than five years of pretrial preparation, on May 7, 1984 counsel for the representatives of the plaintiff class and counsel for the various defendants agreed to a stipulation of settlement. The stipulation required the defendants to pay $180,000,000.00, plus interest, in settlement of all class members' claims. During August 1984,

[1] Citations to "(App.)" are to the Single Appendix filed by the various petitioners in Nos. 87-436, 87-437, and 87-438.

the district court reviewed hundreds of letters from class members and listened to nearly 500 individual veterans and other class members who expressed their views during eleven days of fairness hearings in five cities across the country. (App. 135a). After considering all relevant facts and the applicable legal principles, the district court approved the settlement as fair, (App. 387a-390a), and the court of appeals affirmed, (App. 676a).

The genesis of the litigation dates to late 1978 and early 1979, when several Vietnam veterans filed complaints in federal court seeking relief on behalf of a class of veterans and their families for personal injuries allegedly caused by the veterans' exposure to Agent Orange or other herbicides that were used by the United States as defoliants in Vietnam.[2] On May 8, 1979, the Judicial Panel on Multidistrict Litigation established *In re "Agent Orange" Product Liability Litigation*, MDL No. 381, and ordered the actions transferred to the Eastern District of New York. (App. 689a). Other actions were later transferred, so that by the time of the class-action settlement, more than 500 separate actions brought by some 11,000 named plaintiffs had been transferred from approximately 60 district courts and consolidated in the multidistrict proceeding.

Initially, the class members were unsuccessful in attempting to base their claims on jurisdictional allegations of federal common law. (App. 641a). Thereafter, they asserted diversity of citizenship as the jurisdictional basis

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[2] Agent Orange was a 50:50 mixture of the n-butyl esters of 2,4-dicholorophenoxyacetic acid and 2,4,5-trichlorophenoxyacetic acid. The name Agent Orange derives from the orange band painted on the drums in which the herbicide was delivered to the government. Plaintiffs' claims focused on the allegedly harmful effects of minute quantities of 2,3,7,8-tetrachlorodibenzo-p-dioxin that may have been present in trace amounts in the herbicide.

for their claims. (App. 690a). As pleaded in the Seventh Amended Complaint, all named plaintiffs were citizens of states different from the states of incorporation and principal places of business of the defendants. (JA 3530, 3531-33).[3]

In December 1983, the district court certified two classes, one for all issues under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and one under Rule 23(b)(1)(B) for punitive damages.[4] (App. 456a). The district court ordered that notice to the class be accomplished through a two-phase process. In the first phase of the class notice plan, class counsel was directed to mail written notice to:

> (a) [A]ll persons who have filed actions as plaintiffs in the District Courts of the United States, or filed actions in state courts later removed to a federal court, which are pending in or have been transferred to this court for consolidated proceedings by the Panel on Multi-District Litigation, together with all persons who have moved to intervene or are intervenors, and each class member presently represented by counsel associated with plaintiffs' management committee who has not yet commenced an action or sought intervention * * * [and to]
>
> (b) [A]ll persons who are currently listed on the United States Government's Veterans Administration "Agent Orange Registry."

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[3] Citations to "(JA)" are to the Joint Appendix filed by the parties in the court of appeals.

[4] In affirming the settlement, the court of appeals did not find it necessary to review the propriety of the district court's Rule 23(b)(1)(B) certification, (App. 723a), and petitioner does not challenge that ruling before this Court.

(App. 477a-478a). Written notice was sent to all 11,256 claimants described in subparagraph (a) of the class notice plan, including petitioner. Written notice was also mailed to the 933 counsel associated with the plaintiffs' management committee. That latter mailing included a memorandum from lead counsel for the class requesting all associated counsel to furnish the names and addresses of all class members known to them.

At the same time, pursuant to subparagraph (b) of the class notice plan, written notice was also mailed to all 92,275 persons on the "Agent Orange Registry." (App. 478a). The Agent Orange Registry was instituted in 1978 by the Veterans Administration (the "VA") specifically to identify all Vietnam veterans who were concerned about their possible exposure to Agent Orange. (JA 17180 ¶ 2, 5634). As described in VA circular 10-78-219, which established the framework for the Agent Orange Registry:

> Recent publicity in the news media about illness among persons who were exposed to herbicidal agents used in Southeast Asia, may result in veterans presenting themselves at VA health care facilities for evaluation.
>
> * * * *
>
> VA policy is to examine thoroughly all veterans who claim toxic effects from exposure to herbicides during the Vietnam War and to maintain appropriate records on them so that any late complications due to these agents can be determined and treated.
>
> All Vietnam Era veterans who currently are being treated in a VAHCF, and those who apply for such care will be asked to identify their previous military occupational code number, and asked whether they were exposed to herbicidal sprays or

> bulk chemicals during their periods of service in Vietnam. * * *
>
> If a veteran states that he/she was exposed to defoliant sprays or bulk chemicals, he/she will be asked the questions appearing on the INITIAL DATA BASE, POSSIBLE EXPOSURE TO TOXIC CHEMICALS, PART I, of the regular medical history for an examination * * *.

(JA 3679). Records for each person on the Agent Orange Registry consisted of a medical file with a computerized extract referred to as the "register" that included the veteran's name and address. (JA 3676, 17181). Only a few months before the district court issued its class certification order, the VA had completed an updating of the names and addresses on the Agent Orange Registry. (JA 5634, 17181). In the view of the United States government, the Agent Orange Registry was the VA's "most effective means of identifying concerned Vietnam veterans." (JA 3677).

The district court concluded, (App. 476a-478a), and the court of appeals affirmed, (App. 726a-727a), that the 98,905 putative class members to whom writen notice was sent pursuant to the first phase of the class notice plan were the total number of class members who could be identified through reasonable effort.[5]

In the second phase of its class notice plan, the district court required various forms of "substitute" notice. The court availed itself of the widespread attention the Agent Orange litigation had attracted from the media, state agencies, and private veterans' organizations by ordering

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[5] When written notice was mailed to the claimants and to the persons on the Agent Orange Registry, a comparison of the two lists revealed 4,626 names that were duplicative, so that a total of 98,905 persons are included in the two groups. (JA 17233).

that announcements appear in various servicepersons' national publications and on radio and television. (App. 724a, 727a). In addition, the district court directed that a letter be sent to every governor, requesting that notice of the class action be provided to all state agencies that may have lists of Vietnam veterans. (App. 724a).

No class member, not even petitioner, objected to the class certification order or to any of the notice provisions adopted by the district court, until after settlement of the litigation was concluded.

Reasons for Denying the Writ

The main thrust of the petition is an attempt to show that the court of appeals improperly created new law to adjudicate a unique dispute. (Pet. at 5). Rather than creating new law, however, the decision of the court of appeals adhered to well-settled principles and precedents of this Court and conflicted with no decision of any other federal court of appeals. Moreover, the uniqueness of the Agent Orange controversy severely limits any precedential value that review of the decision may engender, and thus counsels against the expenditure of this Court's resources merely to offer petitioner an additional hearing.[6]

No new law has been created in this case. The court of appeals correctly held that diversity jurisdiction over the subject matter existed because the citizenship of the named plaintiff class members was different from the citizenship of the defendants. Two decisions of this Court dictate that holding. *Snyder* v. *Harris,* 394 U.S. 332 (1969); *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921). No judicial authority exists for petitioner's curious

[6] In addition to the petition's legal infirmities, its bold assertions of fact are unsupported by citation to the record.

proposition that diversity jurisdiction over class actions requires all unknown and unnamed class members to be citizens of states different from the citizenship of the opponents of the class. Nor can petitioner offer any federal decision that conflicts with the court of appeals' decision affirming the notice sent to class members under Fed. R. Civ. P. 23(c)(2). Two of this Court's decisions, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), established the guidelines to which the court of appeals carefully adhered in affirming the order on notice. The Writ should not be granted because there is no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" created by the court of appeals' rulings on diversity jurisdiction and class notice. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Review is unwarranted also because the decision of the court of appeals is inextricably bound to the unique factual circumstances of the case. *Cf. Brown* v. *Southeastern Pennsylvania Transportation Authority*, Nos. 86-2229, 86-4037, 86-5886 (E.D. Pa. Apr. 8, 1987) (The Agent Orange litigation is predicated upon a "unique factual setting.") Even petitioner concedes that "[t]he instant case is of a magnitude and complexity unlike any other" and "in many respects *sui generis.*" (Pet. at 5). On this basis alone, the Writ should not be granted. *See Milliken* v. *Bradley*, 433 U.S. 267, 298 (1977) (Powell, J., concurring); *Carter* v. *Atlanta & St. Andrews Bay Railway Co.*, 338 U.S. 430, 438-39 (1949) (Frankfurter, J., concurring).

The limited precedential value to be garnered from reviewing the court of appeals' decision is especially illustrated by petitioner's argument on class notice. It is

well-settled that notice to class members must be the "best notice practicable under the circumstances." *Eisen,* 417 U.S. at 173. Both the court of appeals and the district court carefully examined all the facts and concluded that the class notice plan, which was tailored to the unique circumstances of the case, was the best notice practicable. Two exhaustive reviews is enough. As this Court has noted, "jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163 (1923); *see Rudolph* v. *United States,* 370 U.S. 269, 270 (1962); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 74 (1955). No additional review should be granted here.

Finally, Mr. Pinkney is peculiarly unsuited to attack the settlement order for including "non-diverse" class members, or to champion the rights of absent class members who Pinkney imagines did not receive notice. He is a citizen of a state different from those of the defendants, and he and his counsel were sent notice.[7]

The Writ should be denied.

I.

The Decision of the Court of Appeals Is Based on Well-Settled and Unanimously Endorsed Principles of Diversity Jurisdiction.

Two decisions of this Court directly refute the jurisdictional arguments advanced by petitioner. In *Snyder* v. *Harris,* 394 U.S. at 332, Justice Black writing for the

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[7] The petition's lack of merit is further exposed by its "conditional" status. It will be withdrawn if the Court denies the petition in *Lombardi* v. *Dow Chemical Company,* No. 87-436. (Pet. at 4-5).

majority confirmed the rule announced in *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. at 356, that diversity of citizenship exists where the *named* class members are citizens of states different from the citizenship of their opponents.

In spite of *Snyder* and *Supreme Tribe,* petitioner asserts that the court of appeals erred in affirming the district court's exercise of diversity jurisdiction over the class because it is "manifest" that some *unnamed* members of the plaintiff class and some defendants *must be* citizens of the same state. (Pet. at 6 & n.2). Petitioner also contends that the court of appeals' affirmance was in error because some named plaintiffs and some defendants were citizens of the same states. (Pet. at 14-17). Neither of petitioner's jurisdictional arguments is worthy of review.

A. Diversity Jurisdiction in a Class Action Is Measured by the Citizenship of the Named Parties.

The issue raised by petitioner has long been settled. Diversity jurisdiction has always been determined by examining the citizenship of the named parties to the particular dispute. The fact that the dispute happens to be a class action has never changed that rule.

In *Supreme Tribe,* 255 U.S. at 356, the Court held that inclusion in a class action of unnamed persons whose citizenship is the same as that of the named defendant did not defeat diversity jurisdiction. In that case, members of an Indiana fraternal benefit association from states other than Indiana brought a class action against the association to enjoin its proposed reorganization. The action was brought pursuant to former Equity Rule 38, which states:

> When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them

> all before the court, one or more may sue or defend for the whole.

226 U.S. 659 (1912). After a judgment upholding the reorganization was entered, actions against the association which raised the same issues were commenced in state court by Indiana citizens. Asserting that the class judgment bound all members of the association, including the Indiana citizens, the association sought relief in federal district court to restrain the state actions. However, the district court refused to enter an injunction. It reasoned that joinder of the Indiana citizens in the original class action would have precluded the diversity jurisdiction of the court, and therefore the original decree did not bind them.

This Court reversed. *Supreme Tribe,* 255 U.S. at 356. It expressly held that the Indiana citizens were members of the class, that their presence as members did not defeat diversity jurisdiction, and that they were bound by the original decree:

> Diversity of citizenship gave the District Court jurisdiction. Indiana citizens were of the class represented; their rights were duly represented by those before the court. * * *
>
> If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction.

Id. at 366-67.

Snyder was a class action for money damages under Fed. R. Civ. P. 23(b)(3), the same provision of Rule 23 under which the present class was certified. Justice Black, confirming the Court's holding in *Supreme Tribe,* wrote for the majority as follows:

> Under current doctrine, if one member of a class is of diverse citizenship from the class opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. *See Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921).

Id. at 340.

Petitioner attempts to dismiss *Snyder* as *obiter dictum.* (Pet. at 11-13). As for *Supreme Tribe,* he characterizes that case as a "true" class acton, under a tripartite scheme created in 1938 and abandoned by this Court in 1966. *Id.* at 12. Petitioner labels the present class-action settlement as "spurious" under the same tripartite scheme. He proceeds to argue that the doctrine of *Strawbridge* v. *Curtiss,* 7 U.S. (3 Cranch) 267 (1806), permits diversity jurisdiction to be determined only in "true" class actions by the citizenship of named parties. For "spurious" class actions, however, petitioner would read *Strawbridge* as commanding that *all* class members, whether named or unnamed, must be of citizenship diverse from the opponents of the class.

Petitioner's distinction is illogical. If *Strawbridge* allows "true" class actions, it also allows any class action in which the citizenship of all named plaintiffs is different from the citizenship of the named defendants. If the rule were as petitioner suggests, then no class action brought under diversity jurisdiction—whether "spurious" or "true" —could include class members who were citizens of the same state as their opponents. *Supreme Tribe* teaches otherwise.

The outdated class-action categories belabored by petitioner have no relevance to diversity jurisdiction. *Supreme Tribe* was decided 17 years before former Rule 23 defined class actions as "true," "hybrid," or "spurious."[8] This Court in *Supreme Tribe* interpreted the same diversity jurisdiction provision at issue in *Strawbridge*, and held that diversity jurisdiction is established when the named class members are citizens of states different from the citizenship of the class's opponents. The type of class action simply is not germane to a proper determination of diversity jurisdiction. The principle followed by *Supreme Tribe* applies to all class actions. *Snyder* and the innumerable federal decisions endorsing *Supreme Tribe* foreclose any other conclusion.[9]

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[8] Under former Rule 23(a)(1), a "true" class action was one brought to enforce a right which was "joint, or common or secondary." A "hybrid" class action under former Rule 23(a)(2) was one in which the rights to be enforced were "several" and the claim involved specific property. A "spurious" class action under former Rule 23(a)(3) was one to enforce "several" rights involving common questions of law and fact and common relief. *See* 2 J. Moore, *Federal Practice*, § 23.00 at 2219 (1938).

[9] *See, e.g., Kerney* v. *Fort Griffin Fandangle Association, Inc.*, 624 F.2d 717, 720 (5th Cir. 1980); *United States ex rel. Sero* v. *Preiser*, 506 F.2d 1115, 1129 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975); *Friedman* v. *Meyers*, 482 F.2d 435, 436 n.1 (2d Cir. 1973); *Mason* v. *American Express Co.*, 334 F.2d 292, 402 (2d Cir. 1964); *National Bank of Washington* v. *Mallery*, 669 F. Supp. 22, 26 (D.D.C. 1987); *Schomber* v. *Jewel Companies*, 614 F. Supp. 210, 215 (N.D. Ill. 1985); *Lumbermen's Underwriting Alliance* v. *Mobil Oil Corp.*, 612 F. Supp. 1166, 1168 n.2 (D. Idaho 1985); *Pirrone* v. *North Hotel Associates*, 108 F.R.D. 78, 84 n.2 (E.D. Pa. 1985); *McMahon Books, Inc.* v. *Willow Grove Associates*, 108 F.R.D. 32, 40 n.5 (E.D. Pa. 1985); *In re Federal Skywalk Cases*, 93 F.R.D. 415, 420 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982); *In re "Dalkon Shield" Products Liability Litigation*, 526 F. Supp. 887, 910 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). *See also Casper* v. *Cunard Line, Ltd.*, 560 F. Supp. 240, 242 (E.D. Pa.

(footnote continued on following page)

Petitioner fails to recognize that the three outdated categories of class actions defined in former Rule 23 merely attempted to clarify the "common or general interest" standard for class actions contained in former Equity Rule 38, the class action rule at issue in *Supreme Tribe*. *See* Fed. R. Civ. P. 23 advisory committee note (former Rule 23 is a "substantial restatement" of former Equity Rule 38); *System Federation No. 91* v. *Reed*, 180 F.2d 991, 995 (6th Cir. 1950). Because all Rule 23 class actions share the common heritage of Equity Rule 38, petitioner's contention that the principle applied in *Supreme Tribe* properly applies only to "true" class actions is unfounded. This is confirmed by the decisions after 1938 expressly applying *Supreme Tribe* to the "spurious" type of class action.[10]

Petitioner's belief that various federal court decisions support his position is mistaken. (Pet. at 10). In *Hackner* v. *Guaranty Trust Co.*, 117 F.2d 95 (2d Cir. 1941), *Steele*

(footnote continued from preceding page)

1983); *Esler* v. *Northrop Corp.*, 86 F.R.D. 20, 28 (W.D. Mo. 1979); *Rocket Oil and Gas Co.* v. *Arkla Exploration Co.*, 435 F. Supp. 1303, 1304-05 (W.D. Okla. 1977); *McGarry* v. *Lentz*, 9 F.2d 680, 683 (S.D. Ohio 1925).

[10] *See, e.g., Dickinson* v. *Rinke*, 11 Fed. R. Serv. 489 (S.D.N.Y. 1948), *aff'd*, 197 F.2d 973 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952); *Shipley* v. *Pittsburgh & Lake Erie R.R.*, 70 F. Supp. 870 (W.D. Pa. 1947); *see also Philadelphia Local 192* v. *American Federation of Teachers*, 44 F. Supp. 345 (E.D. Pa. 1942) (*dicta*).

Congress amended Rule 23 in 1966 and eliminated the tripartite class action scheme. As a result, all class judgments became binding on all class members, just as class judgments under former Equity Rule 38 and its predecessor bound all class members. *See Supreme Tribe*, 255 U.S. at 366-67; *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288 (1853). Following the 1966 amendments, historically "spurious" class actions ceased being "permissive joinder devices," (Pet. at 9), if indeed they ever were, and became identical in substance and effect to historically "true" class actions. Therefore, no significant difference exists among class actions that would justify selective application of *Supreme Tribe* by this Court.

v. *Guaranty Trust Co.*, 164 F.2d 387 (2d Cir. 1947), and *Knowles* v. *War Damage Corp.*, 171 F.2d 15 (D.C. Cir. 1948), the courts ruled that class members could not aggregate separate and distinct claims to satisfy the amount-in-controversy requirement. Each case reached the correct result because aggregation of such claims has always been prohibited by this Court. *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973); *Pinel* v. *Pinel*, 240 U.S. 594 (1916); *Oliver* v. *Alexander*, 31 U.S. (6 Pet.) 143 (1832). In *Farmers Co-op. Oil Co.* v. *Socony-Vacuum Oil Co.*, 133 F.2d 101 (8th Cir. 1942), also cited by petitioner, the court merely held that a class action could not proceed because the plaintiffs had failed to satisfy the "common relief" requirement of former Rule 23(a)(3). Finally, petitioner's citation to *Illinois ex rel. Scott* v. *Hunt Int'l Resources Corp.*, 481 F. Supp. 71 (N.D. Ill. 1979), is disingenuous. *See* (Pet. at 12 n.8). In that case, the Attorney General of Illinois brought a suit in state court that was later removed to district court on grounds of diversity jurisdiction. The Attorney General moved for remand to state court. The district court granted the motion, holding that diversity did not exist because the Attorney General was the alter ego of the state, and a state is not a citizen for purposes of diversity jurisdiction. Rather than supporting petitioner's argument, the *Hunt* court contradicted it by rejecting the suggestion that it "look past the representative to the unknown class members to determine diversity." *Id.* at 74.

The rashness of petitioner's attack on the well-settled rule of *Supreme Tribe* and *Snyder* was abundantly clear to the court of appeals:

> [W]e confess a certain surprise at the vigor with which this argument was pressed in this court and the amount of time that was devoted to it at oral argument. It is horn-book law, based on 66

> years of Supreme Court precedent, that complete diversity is required only between the named plaintiffs and the named defendants in a federal class action.

(App. 710a) (citation omitted).[11]

B. The Named Plaintiffs and the Defendants Were Citizens of Different States.

Petitioner argues alternatively that the exercise of diversity jurisdiction over the class-action settlement was improper even if the Court chooses to endorse the 66 years of settled precedent spawned by *Supreme Tribe*. The petition asserts that (1) representative plaintiff Brian Quinn and defendant Riverdale Chemical were both Illinois citizens; (2) representative plaintiff Michael Ryan and defendant Hooker Chemical were both New York citizens; and (3) representative plaintiff Dan Jordan and defendant Diamond Shamrock were both Texas citizens. (Pet. at 14-17). A review of the Seventh Amended Complaint and the decision of the court of appeals amply demonstrates that petitioner's argument does not deserve this Court's attention. (JA 3533; App. 711a-713a).

The Seventh Amended Complaint was the first brought under diversity jurisdiction to name the class representatives. Consequently, it is the relevant complaint to assess

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[11] Petitioner's concerns regarding diversity jurisdiction are largely theoretical, as the district court could have entertained a number of alternative approaches. For example, a class action against all defendants could have been certified that included all veterans who were citizens of states other than the states in which any of the defendants was incorporated or had its principal place of business. Additional class actions could have been certified for the veterans from each state of which a defendant was a citizen, with each such action omitting the non-diverse defendant. All class actions could then have been consolidated and settled. The same result—a $180,000,000.00 settlement approved by the district court and affirmed by the court of appeals—would have occurred.

diversity jurisdiction. (App. 711a). Plaintiff Quinn was not named in the Seventh Amended Complaint. Former defendants Riverdale and Hooker had been dismissed prior to the filing of the Seventh Amended Complaint, and were not named therein. The citizenship of those former parties is irrelevant to the determination of diversity jurisdiction.

Because the dismissal of Riverdale and Hooker did not include a Fed. R. Civ. P. 54(b) certificate, petitioner claims that they remained parties for purposes of determining diversity jurisdiction. (Pet. at 15). Petitioner's argument ignores the "obvious purpose" of Rule 54(b), which is to assist a party in determining when an order of the district court may be appealed. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 512 (1950). Consequently, as the court of appeals ruled, the lack of a Rule 54(b) certificate is irrelevant to the issue of diversity jurisdiction. (App. 712a).

Petitioner further claims that diversity was compromised because the Seventh Amended Complaint included plaintiff Dan Jordan, a citizen of Texas, and defendant Diamond Shamrock as named parties. The court of appeals properly described this argument as "meritless," *id.*, because Diamond Shamrock's principal place of business was in Ohio when the action was brought. *Smith* v. *Sperling*, 354 U.S. 91, 93 n.1 (1957) (jurisdiction "is tested by the facts as they existed when the action is brought * * *.") The fact that Diamond Shamrock later moved its principal place of business to Texas did not oust the court of jurisdiction. *See St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289-90 (1938).

II.

The Fact-Bound Determinations Concerning Notice to Class Members Do Not Warrant Review by This Court.

Petitioner concedes that this Court's decision in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. at 314-20, and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. at 175, articulated the well-settled standard that governs the dissemination of notice to class members under Fed. R. Civ. P. 23 (c)(2). (Pet. at 17). That standard requires that the district court "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Petitioner does not dispute that those standards were applied by the district court and the court of appeals. (Pet. at 17-19). Petitioner's sole contention is that the court of appeals erred by not reversing factual determinations as to which class members could be identified through reasonable effort. *Id.* at 23-26. Specifically, petitioner asserts that the district court should have directed notice to a vastly larger group of people—all those who served in Vietnam—merely because the Agent Orange class members constitute a small subset of that group.

Petitioner's contention is totally unsupported in the law and is based on the sheer fantasy that there existed a substantially complete list of all persons who had served in Vietnam. (Pet. at 21). As the record amply demonstrates, no list of those persons has ever existed.

Class counsel served a subpoena on the custodians of records for the VA and the Department of Defense, seeking

all documents that contained the names and addresses of all active and retired personnel who served in Vietnam. (JA 1734). In response to the subpoena, the United States furnished declarations from five representatives of the VA and from Richard S. Christian, the Chief of the Agent Orange Task Force. (JA 17182-84). The Agent Orange Task Force was commissioned to provide records support for the congressionally mandated epidemiological study of Agent Orange being conducted by the VA. (JA 17182).

As Chief of the Agent Orange Task Force, Christian had consulted with representatives of the Army, Navy, and Air Force to determine the feasibility of identifying the names and addresses of Vietnam veterans from personnel files of the Armed Services. *Id.* In his declaration, Christian described in careful detail the inutility of the Armed Services' records for identifying class members, and concluded:

> Because of limitations inherent in the record keeping system of the armed services, only a small percentage of Vietnam veterans can be identified by computer. A manual search of millions of individual records would be required to identify the remainder, a task that would take several years to complete at a cost of several million dollars.

(JA 17183).

The decentralized records of the VA—with the single and important exception of the Agent Orange Registry which was used by the district court to identify class members—were also found to be of no value in naming Vietnam veterans who may have been class members. Those files neither purported to include the names of all veterans who served during the "Vietnam era," nor differentiated between "Vietnam-era" veterans who served in Vietnam and those

who served elsewhere.[12] (JA 17178-79). Even if petitioner's proposal for dissemination of notice to the over-inclusive group of Vietnam veterans had some merit, there existed no reasonable way to c reate such a list. As the court of appeals stated:

> We cannot agree with appellants that all 2.4 million Vietnam veterans should have been sent letter notice. First, it is undisputed that far fewer than that number were exposed to Agent Orange. A requirement ttat notice be given to all Vietnam veterans would thus have been considerably overbroad. Second, there is no assurance that such a list could have been compiled through reasonable efforts. Appellants claim that some records kept by the government would have facilitated individualized notice. They concede, however, that there was no easily accessible list of veterans * * *. We cannot find, therefore, that such a comprehensive list could reasonably have been compiled.

(App. 726a-727a). Moreover, as the court of appeals further observed, petitioner never objected to the notice provisions and offered

> no feasible alternative to the notice plan adopted by the district court for identifying and contacting persons actually exposed to Agent Orange. In this regard, we are informed by the statement of our late colleague Judge Friendly that it is inappropriate to second-guess a district court's class notice procedure, "particularly [where] no alternative method of ascertaining class members' identities has been suggested to us."

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[12] Of the estimated 9.1 million veterans who served in the Armed Forces during the "Vietnam era," only an estimated 2.5 million veterans, or 27 percent, actually served in Vietnam. (JA 17173). Of that smaller group, only a fraction could possibly have been class members.

(App. 727a) (*quoting Weinberger* v. *Kendrick*, 698 F.2d 61, 71 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983)).

The district court's determination of which class members were identifiable through reasonable effort was a factual one that was not overturned by the court of appeals as clearly erroneous. Having reviewed the entire record, the court of appeals was not "left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). *See also Anderson* v. *Bessemer City*, 470 U.S. 564, 573-76 (1985) (facts based on documentary evidence or inferences from other facts must be clearly erroneous to be overturned); Fed. R. Civ. P. 52(a). There is no reason for this Court to conduct yet another review.[13]

[13] Petitioner's exaggerations about the number of class notices that were returned as undeliverable relate only to supplemental lists provided by state governors in response to the court's substitute notice plan. The court could not utilize supplemental information supplied by two states, West Virginia and Massachusetts, because it was untimely or not in proper form. Even so, of the 28,000 West Virginia "Vietnam-era" veterans whose names were sent to the court, 8,000 had been sent notice in addition to the 1,087 class members from West Virginia who were identified through phase one of the class notice plan. (JA 17237, 11638-39). Concerning Massachusetts, 3,808 Massachusetts class members were identified and sent notice through phase one of the class notice. (JA 11638-39).

III.

The Decision of the Court of Appeals Is Not in Conflict With This Court's Holding in *Phillips Petroleum Co.* v. *Shutts.*

Petitioner further contends that absent class members who did not receive written notice, if any, are not bound by the judgment approving the settlement.[14] (Pet. at 20, 27-29). Petitioner then extrapolates that if all class members did not actually receive written notice, the settlement should be overturned. To support his reasoning, petitioner misconstrues language in *Phillips Petroleum Co.* v. *Shutts,* 472 U.S. 797 (1985), and urges the novel proposition upon this Court that all prior federal class action law was overturned by *Shutts,* which involved a Kansas state class action.

No case has ever held, and *Shutts* does not require, that personal notice actually be received by an absent member of a class certified under Rule 23(b)(3) in order that he be bound by the class-action judgment. *See Mullane,* 339 U.S. at 317-19. That some class members may not receive actual notice but be bound by the judgment is, perhaps, inevitable. It is a *sine qua non* for accomplishing the goals of Rule 23.

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[14] Petitioner has not identified even one class member who did not receive adequate notice of the class action. The petition merely raises the *hypothetical* possibility that some unnamed and unknown "class members" *may not have* received notice. (Pet. at 19-20).

It is well established that the sending of first-class mail to the last known addresses of class members who can be identified through reasonable effort, in conjunction with substitute notice for unidentifiable class members, fully satisfies the requirements of Rule 23 and due process. *See, e.g., Eisen,* 417 U.S. at 173-77; *Schroeder* v. *City of New York,* 371 U.S. 208, 214 (1962) (city's obligation to notify appellant of her right to be heard in condemnation proceeding was "an obligation which the mailing of a single letter would have discharged"). Indeed, this Court expressly has declined to require personal service of notice, even though receipt would thereby be guaranteed. *Mullane,* 339 U.S. at 318-19.

Shutts does not overrule or modify these well-settled principles. To misread its holding as requiring proof of receipt by all class members would destroy Rule 23, and render meaningless the principles established in *Eisen* and other decisions. *See generally* Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co.* v. *Shutts,* 96 Yale L.J. 1, 19-20 (1986). Potential rights of hypothetical class members cannot be artificially heightened such that the practical necessities of *res judicata* are ignored. It does not offend any person's due process rights to let stand a class-action settlement in the face of hypothetical allegations that there *may* exist an absent class member who did not receive notice. *See Hansberry* v. *Lee,* 311 U.S. 32 (1940).

The Writ should be denied.

Conclusion

For the reasons set forth above, Respondents respectfully pray that the Court deny the petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit.

Dated: November 30, 1987

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD PINKNEY, *et al.*,

Petitioners,

v.

DOW CHEMICAL CO., *et al.*,

Respondents.

In re "Agent Orange" Product Liability Litigation

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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December 9, 1987

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-437

RICHARD PINKNEY, *et al.*,

Petitioners,

v.

DOW CHEMICAL CO., *et al.*,

Respondents.

In re "Agent Orange" Product Liability Litigation

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

SUMMARY OF THE ARGUMENT

The petition should be granted primarily because the District Court lacked the jurisdiction necessary to rule on this matter. They also incorrectly certified this class action since the notice requirement of Rule 23(c) was not satisfied. In addition, the arguments presented by respondents are incorrect, inaccurate and do not accurately display the facts and rules pertinent to the matter. In fact, many of the precedents cited

by the Respondents actually aid in proving the error made by the Court below. Also, Respondents urge that the true issues be ignored and that the Petitioners' claim of adequate notice be denied while attempting to distract the Court by bringing up issues purely technical in nature. This position ignores the stipulations required by the Federal Rules of Civil Procedure and Due Process.

ARGUMENT

I. THE DISTRICT COURT LACKED SUBJECT-MATTER JURISDICTION AND JURISDICTION OVER THE PERSONS OF THE CLASS AND IMPROPERLY CERTIFIED THE CLASS ACTION WITHOUT NOTICE REQUIRED BY FEDERAL RULE OF CIVIL PROCEDURE 23(c).

In the Court of Appeals, Petitioners sought reversal of the judgment on the grounds, *inter alia,* that the District Court lacked subject matter jurisdiction and jurisdiction over persons of the class members, that the class was improperly certified, and that notice given failed to meet the standards either of Fed. R. Civ. P. 23(c) or of due process. Those issues were raised in the District Court by motions filed by class members who, having received notice *after* the expiration of the opt-out period, were swept into the class without their knowledge or consent. One such motion is appended to this memorandum as illustrative.

The attack on the *judgment* made in the Court of Appeals and sought to be made in this Court is that as the District Court had no jurisdiction over the subject matter of the action or the persons of the plaintiff class members, it had no power to go to judgment, by settlement or otherwise. Moreover, the class was improperly certified without notice that satisfied the requirement of Rule 23(c) and of due process, illustrating that the District Court had no power to enter-

tain or to certify the class action. Without jurisdiction and without proper notice, the judgment is void. These issues were raised in the District Court and in the Court of Appeals, and are raised in the petition to this Court.[1]

II. RESPONDENTS' ARGUMENT THAT PETITIONERS HAVE NO STANDING TO ARGUE LACK OF SUBJECT MATTER JURISDICTION IS INCORRECT.

Respondents argue that petitioners have no standing to argue that subject-matter jurisdiction does not exist. As this Court well knows, subject-matter jurisdiction may be raised by any person at any time. Fed. R. Civ. P. 12(h)(3); *Insurance Corp. v. Compagnie de Bauxites,* 456 U.S. 694, 701-02 (1982); *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 377 n.2 (1978), even by the person who invoked federal jurisdiction originally. *American Fire* & Casualty Co. v. Finn, 341 U.S. 6 (1951). One need not be the nondiverse party to raise the issue. Thus, the fact that Richard Pinkney was not nondiverse from any defendant is immaterial. Even if it were material, however, the result would be no different. The issue was raised by veterans who are citizens of Illinois who were nondiverse from Defendant Riverdale Chemical.

III. RESPONDENTS' ARGUMENT THAT PETITIONERS DO NOT CLAIM THEY DID NOT RECEIVE NOTICE IS UNTRUE.

Respondents also argue that petitioners do not claim that they did not receive notice. That just not true. Many peti-

[1]Respondent's reference (Br. in Opp. 1) to "all attorneys for veteran class member, including counsel for petitioners, had urged that the claims proceed in the class action context" is just not accurate. Sherman L. Cohn as well as the counsel who initially brought him into this case, Richard Steagall of Peoria, Illinois, and Ashcraft and Gerel did not so urge. Indeed, Mr. Steagall, among other counsel, urged to the contrary at every opportunity.

tioners did not receive notice at all until after the time to opt-out had expired and the settlement was announced three days later. (Appendix to this Memorandum at 3a, 4a.) The same is true concerning class certification. There were objections made as soon as veterans heard about the class action.

With respect, the fact that Ashcraft & Gerel, the law firm representing some class members, did not object until after the settlement was announced is irrelevant. Other attorneys representing other veterans who are among the petitioners raised those issues as soon as notice reached those veterans. (Appendix to this Memorandum at 2a-9a.) The fact that so many did not receive notice until after the settlement demonstrates the inadequacy of the notice.

IV. RESPONDENTS' ARGUMENT THAT DIVERSITY IS TO BE MEASURED IN A RULE 23(b)(3) CLASS ACTION SOLEY BY THE CITIZENSHIP OF CLASS REPRESENTATIVES IGNORES THE FACTS AND LAW WHICH ARE RELEVANT TO THIS MATTER.

Respondents' statement that there is "66 years of clear precedent that diversity is to be measured in a Rule 23(b)(3) class action solely by the citizenship of class representatives" ignores the facts and relevant law. *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356 (1921), was *not* a Rule 23(b)(3) type class and thus is no precedent for the ruling of the court below. Indeed, as far as it may be such precedent, its vitality has been sapped (if in fact it has not been overruled entirely) by this Court in *Zahn v. International Paper,* 414 U.S. 291 (1973), and *Owen Equipment & Erection Co. v. Kroger,* 347 U.S. 365, 377 (1978). See J. Moore, *Moore's Federal Practice* (*Rules Pamphlets*), § 23.17, at 241-42 (5th Ed. 1987). The *dicta* in *Snyder v. Harris,* 394 U.S. 332, 341 (1968), and *United States ex rel. Sero v. Preiser,* 506 F.2d 1115, 1129 (2d Cir. 1974), cannot change the law.

V. THE TWO CASES CITED BY RESPONDENTS FOR THE PROPOSITION THAT MINIMAL DIVERSITY IS ALL THAT IS REQUIRED BY ARTICLE III OF THE CONSTITUTION ACTUALLY PROVE THE ERROR OF THE COURT BELOW.

Respondents cite two cases for the proposition that minimal diversity is all that is required by the Constitution, specifically Article III. Ironically, these cases prove the error made by the court below. In each case — *State Farm v. Tashire,* 386 U.S. 523 (1967), and *Twentieth Century Fox Film Corp. v. Taylor,* 239 F.Supp. 913 (S.D.N.Y. 1965) — the court relied upon specific statutes for a congressionally grafted exception to the requirement of complete diversity. In the words of this Court, it is the "legislative extension" of diversity that permits an exception to the complete diversity requirement used in these cases. *State Farm v. Tashire,* 386 U.S. at 531.

It is the lack of a statute in the instant case that forms the basis of this petition. Moreover, it is the lack of statute which demonstrates that the *dicta* in *Snyder v. Harris,* on which the Court relied so heavily, is not only dicta but is wrong. Finally, it is the lack of statute here that makes clear the pernicious effect of the decision of the court below. When added to the *dicta* in *Snyder v. Harris,* the ruling of the court below constitutes a recognition of a drastic extension of federal jurisdiction without statutory authorization. This drastic extension of jurisdiction must be reviewed by this Court.

VI. THE RESPONDENTS' ASSERTION THAT THE ORDER IS APPEALABLE IS NOT IN ACCORDANCE WITH RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Respondents' Brief in Opposition to Certiorari at 11, *Pinkney v. Dow Chemical Co.,* No. 87-437 (1987) notes that a Fed. R. Civ. P. 54(b) certificate renders appealable an order

that otherwise would not be appealable. The reason that order would not be appealable, of course, is that the order is not final and is subject to revision by the court. Respondents call this a "technical" matter. As far as claiming that a party being in or out of a case is a technical matter, so is every diversity case where jurisdiction is defeated by the presence of a nondiverse party. That is this case.

VII. RESPONDENTS INCORRECTLY ARGUE THAT THE NOTICE ISSUE IS SOLELY ONE OF DISCRETION AND IGNORES THE FACT THAT THE FEDERAL RULES AND DUE PROCESS WERE NOT FOLLOWED.

Finally, Respondents argue that the notice issue is solely one of discretion. With respect, that is a misapprehension of the issue raised by the petition. Rather, the issue is one of failure to follow the requirements of Fed. R. Civ. P. 23(c) and of Due Process. The issue is also the clear failure of the Respondents to carry out the notice order of the district court — an issue which Respondents understandably fail to address. An error of this magnitude in such a highly visible case should not go unaddressed by this Court.

CONCLUSION

For the reasons detailed more fully in the petition, it is respectfully urged that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Counsel for Petitioner

Dated: Washington, D.C.
December 9, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re "AGENT ORANGE" Product Liability Litigation	MDL No. 381
RONALD EDDLEMON, SR., Individually and as Father and Next Friend of RONALD EDDLEMON, JR., a Minor; J. MICHAEL SULLIVAN, Individually and as Father and Next Friend of REBECCA MARGARET SULLIVAN, a Minor; CHARLES WILLIAM WARD, Individually and as Father and Next Friend of SANDRA WARD, a Minor, CHARLES WARD, a Minor, NEIL WARD, a Minor, TONYA WARD, a Minor, and PHILLIP WARD, a Minor; and LARRY FETTERS and LILA FETTERS, Husband and Wife.	

MOTION FOR EXCLUSION FROM CLASS OF PERSONS BOUND BY PROPOSED SETTLEMENT OR ALTERNATIVELY, OBJECTIONS TO PROPOSED SETTLEMENT

Now come Plaintiffs, RONALD EDDLEMON, SR., Individually and as Father and Next Friend of RONALD EDDLEMON, JR., a Minor, J. MICHAEL SULLIVAN, Individually and as Father and Next Friend of REBECCA MARGARET SULLIVAN, a Minor, CHARLES WILLIAM WARD, Individually and as Father and Next Friend of SANDRA WARD, a Minor, CHARLES WARD, a Minor, NEIL WARD, a Minor, TONYA WARD, a Minor,

and PHILLIP WARD, a Minor, and LARRY FETTERS and LILA FETTERS, Husband and Wife, by their attorneys, RICHARD L. STEAGALL and JOHN P. NICOARA, and pursuant to this Court's apparent Order entered in connection with a purported settlement of the class action certified in this matter (as set forth in the Notice of Proposed Settlement of Class Action and Claim Form) hereby assert the following objections to the purported settlement of their claims for personal injuries arising out of exposure to Agent Orange:

1. Plaintiffs, RONALD EDDLEMON, SR., Individually and as Father and Next Friend of RONALD EDDLEMON, JR., a Minor, J. MICHAEL SULLIVAN, Individually and as Father and Next Friend of REBECCA MARGARET SULLIVAN, a Minor, CHARLES WILLIAM WARD, Individually and as Father and Next Friend of SANDRA WARD, a Minor, CHARLES WARD, a Minor, NEIL WARD, a Minor, TONYA WARD, a Minor, and PHILLIP WARD, a Minor, and LARRY FETTERS and LILA FETTERS, Husband and Wife, on July 18, 1984 have filed a certain action against the Defendants, THE DOW CHEMICAL COMPANY, a Corporation, MONSANTO COMPANY, a Corporation, UNIROYAL, INC., a Corporation; DIAMOND SHAMROCK CORPORATION, a Corporation, HERCULES, INCORPORATED, a Corporation, T-H AGRICULTURE & NUTRITION CO., INC., a Corporation and THOMPSON-HAYWARD CHEMICAL COMPANY, a Corporation, in the United States District Court, Central District of Illinois Peoria Divison, bearing Case No. 84-1248. A certificate copy of the Complaint is attached hereto as Exhibit F.

2. Plaintiffs move for exclusion from the proposed settlement of class action and any judgment this Court may enter thereon due to this Court's lack of jurisdiction over their per-

sons and lack of subject matter jurisdiction over their claims arising from exposure to Agent Orange.

3. None of these Plaintiffs were represented by their undersigned chosen counsel in the purported settlement of their claims tentatively agreed upon on May 7, 1984 by the management committee of Plaintiff's counsel for this class.

4. Only the Plaintiff, RONALD EDDLEMON, SR., received any notice of the pendency of the class action prior to the May 1, 1984 date for opting out of the class. (See Affidavit of RONALD EDDLEMON, SR. attached hereto as Exhibit A, Affidavit of J. MICHAEL SULLIVAN, attached hereto as Exhibit A, Affidavit of CHARLES WILLIAM WARD, attached hereto as Exhibit C, and Affidavit of LARRY FETTERS, attached hereto as Exhibit D and made a part of these objections.) Execution of LARRY FETTERS' Affidavit is being obtained and will be filed separately with this Court).

5. Two opinions of this Court dealt with the issues of whether the underlying actions filed herein should be certified as a class action under Rule 23 of the Federal Rules of Civil Procedure. This Court per Judge Pratt ruled on December 29, 1980 that this action would proceed as a class action under FRCP 23(b)(3) and left formal certification to be the subject of a separate Order. *In re Agent Orange Product Liability Litigation*, 506 F. Supp. 762, 791 (E.D.N.Y. 1980). On December 16, 1983, this Court per Chief Judge Weinstein certified a class of Vietnam-veteran plaintiffs for trial of the issue of the condition of the defendants' product, determination of the issues of general causation, resolution of the defendants' defenses of assumption of risk, misuse, and the government contract defense, and the issue of punitive damages. *In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718, 723, 724, 729 (E.D. N.Y. 1983).

6. Neither of these Court opinions set forth any procedure whereby the individual damage claims of the claimants would be considered on a class action basis. In fact, Judge Pratt's opinion leaves open the question of whether the individual damage claims and issues of specific causation can be best resolved under the direct supervision of this Court or by remand of subclass actions to transferor courts for processing in ways appropriate to the circumstances of the subclasses. 506 F.Supp. at 786. Judge Weinstein's opinion makes no mention of resolution of the individual plaintiffs' damage claims and the issues of specific causation and in fact, specifically reserves the issue of specific causation for future resolution. 100 F.R.D. at 724.

7. In reliance upon the aforementioned opinions holding that class certification were for issues other than the individual plaintiffs' claims for damages and the issues of specific causation, the undersigned advised the Plaintiff, RONALD EDDLEMON, SR., to refrain from opting out of the class action. (See Affidavit of undersigned attached hereto as Exhibit E). None of the other Plaintiffs named herein had notice of this action at that time and had no opportunity to exercise a right to opt out of the class action certification. (See Affidavit attached as Exhibits A, B, C & D). LARRY FETTERS' Affidavit will be filed separately.

8. The undersigned Plaintiffs' counsel learned on May 7, 1984 through popular media reports that a purported settlement of the class action had been entered into. It was not until July 16, 1984 that the undersigned counsel received a copy of the Notice of Proposed Settlement of Class Action and Claim Form setting forth the details of the proposed settlement, despite his May 8, 1984 request to the clerk that such information be provided.

9. Plaintiffs intend to object to the transfer of the Central District of Illinois action they have filed to this Court, pursuant to the tag-a-long provisions of Rule 9 of the Rules of Civil Procedure of the Judicial Panel of Multi-District Litigation. Plaintiffs desire to pursue their individual claims in the Central District of Illinois; transfer is of no utility due to the proposed settlement of this multi-district proceeding.

10. Plaintiffs' undersigned attorney cannot evaluate the adequacy of the settlement in any detail as the details are presently unavailable to him; Defendants' assets and insurance coverage are said to be $9 billion to $16 billion and the best estimate of the special master appointed by order of this Court is that the number of claims may total 40,000 to 50,000. *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. at 727. If the represented number of 40,000 claimants is correct, the average available cash payment per claim is $4,500. Such is palpably inadequate compensation for these named Plaintiffs' injuries, and the undersigned suspects that it is palpably undercompensation for the injuries of other members of the class. The $4,500 per-claim figure does not take into account the attorneys fees and expense that must be awarded to members of the plaintiffs' class nor does it take into account management fees for management of the fund. While information is sketchy, it is clear that the purported $180 million settlement is woefully inadequate to settle the individual claims of the members of the class.

11. Plaintiffs' claims arise under the law of the State of Illinois; none of the named Plaintiffs have any contact with the State of New York or this Court beyond that thrust upon them by this broad-reaching class action certification purportedly made pursuant to this Court's diversity jurisdiction.

12. Plaintiffs object to this Court's purported exercise of jurisdiction over their person and over the subject matter of

their claims as contrary to the guarantees of due process of law set forth in the Fifth & Fourteenth Amendments to the Constitution of the United States. The purported exercise of jurisdiction over Plaintiffs by this Court violates constitutional guarantees of the Constitution of the United States in the following respects:

(a) No notice of suit was received by Plaintiffs, J. MICHAEL SULLIVAN, CHARLES WILLIAM WARD, and LARRY FETTERS until after the May 1, 1984 date for opting out of the class action had expired.

(b) Inadequate notice of the suit was received by the Plaintiff, RONALD EDDLEMON, SR., in that he received the Court-approved Notice of Pendency of Class Action during the week of March 16, 1984, a grossly inadequate period of time for his undersigned attorney to fully and completely evaluate the merits of opting in or opting out of said class.

(c) The Notice received by Plaintiff, RONALD EDDLEMON, SR., was inadequate in that it did not inform him with particularity of the representative plaintiffs and their attorneys intention to compromise plaintiffs' claims for damages in settlement of this class action.

(d) Plaintiffs have no contact with the State of New York, this Court's forum, nor do they consent to jurisdiction over their person in the forum of this Court.

(e) Plaintiffs have been denied the effective assistance of counsel guranteed to them by the Fifth and Fourteenth Amendments to the Constitution of the United States in that the attorneys of the Plaintiffs Management Committee who have purporteldy

settled their claims for damages have never considered any specific information concerning the Plaintiffs' injuries, nor have said Plaintiffs Management Committee attorneys ever specifically communicated with or acknowledged the existence of the named Plaintiffs herein.

(f) The representative plaintiffs in this class action and their attorneys are in a position of substantial conflict between their intersts and the interests of these named Plaintiffs.

(g) Plaintiffs' claims have been asserted in the lawsuit pending in the United States District Court for the Central District of Illinois under the laws of the State of Illinois in an Illinois forum, the Central District of Illinois sitting on a diversity case; this Court lacks any jurisdiction to force Plaintiffs to accept its versions of national consensus laws in a forum foreign to them and forced upon them.

(h) Plaintiffs will be denied a right to trial by jury of their claims at common law, which right is guaranteed to them by the Seventh and Fourteenth Amendments to the Constitution of the United States of America should this Court enter judgment on the purported settlement of this class action; instead of receiving their right to a trial by jury, these Plaintiffs must accept a bureaucratic adjustment of claims thrust upon them by this Court without authority from the Congress of the United States or the Legislature of the State of New York or of any other state of these United States of America.

13. The proposed settlement and any judgment entered thereon is voidable at the option of the minors named herein, RONALD EDDLEMON, JR., a Minor, REBECCA MARGARET SULLIVAN, a Minor, SANDRA WARD, a Minor,

CHARLES WARD, a Minor, NEIL WARD, a Minor, TONYA WARD, a Minor, and PHILLIP WARD, a Minor in that it is entered into by persons not authorized to act on the said minors' behalf and by a court without jurisdiction over the person or the subject matter of any settlement agreement of the Minors' claims. (Authenticated copies of the Orders of the Circuit Courts of Peoria and Tazewell County, Illinois finding it in the minors' best interests to reject the proposed class action settlement agreement are attached hereto as Exhibits G & H). A similar guardianship proceeding is being opened on behalf of REBECCA MARGARET SULLIVAN, a Minor, in the Circuit Court of Cook County, Illinois, the minor's county of residence.

14. Plaintiffs are filing a separate memorandum setting forth authorities in support of this motion.

WHEREFORE, Plaintiffs RONALD EDDLEMON, SR., Individually and as Father and Next Friend of RONALD EDDLEMON, JR., a Minor, J. MICHAEL SULLIVAN, Individually and as Father and Next Friend of REBECCA MARGARET SULLIVAN, a Minor; CHARLES WILLIAM WARD, Individually and as Father and Next Friend of SANDRA WARD, a Minor, CHARLES WARD, a Minor, NEIL WARD, a Minor, TONYA WARD, a Minor, AND PHILLIP WARD, a Minor; and LARRY FETTERS AND LILA FETTERS, Husband and Wife, move this Court to enter an order allowing them leave to opt out of the certified class instanter by the filing of this motion or alternatively, to sustain the objections to the settlement set forth below and exempt them from any judgment entered on this class action settlement barring litigation of further claims arising out of Agent Orange:

(a) The purported class action settlement and judgment is made without their consent, over their objections

by counsel whom they have rejected and who have been forced upon them by this Court.

(b) The purported class action settlement and proposed judgment is entertained in a forum with which they have no contact and in which they have not consented to jurisdiction over their person.

(c) The purported class action settlement and proposed judgment have denied them effective assistance of counsel in the presentation and evaluation of their claims for damages against the named Defendants.

(d) The purported class action settlement and proposed judgment denies without their consent personally or through any legislative enactment their constitutionally guaranteed rights to trial by jury of their claims in common law.

(e) The purported class action settlement and proposed judgment forces them to engage in complicated litigation in a forum not of their choosing to attempt to preserve their rights to try their cases under the

laws of the State of Illinois in the United States District Court for the Central District of Illinois.

RONALD EDDLEMON, SR., Individually and as Father and Next Friend of RONALD EDDLEMON, JR., a Minor; J. MICHAEL SULLIVAN, Individually and as Father and Next Friend of REBECCA MARGARET SUILLIVAN, a Minor; CHARLES WILLIAM WARD, Individually and as Father and Next Friend of SANDRA WARD, a Minor, CHARLES WARD, a Minor; NEIL WARD, a Minor, TONYA WARD, a Minor, and PHILLIP WARD, a MiNor; and LARRY FETTERS and LILA FETTERS, Husband and Wife, Plaintiffs

BY /s/ Richard L. Steagall
RICHARD L. STEAGALL, one of their Attorneys

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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re "AGENT ORANGE" Product Liability Litigation	)	MDL No. 381
RONALD EDDLEMON, SR., Individually and as Father and Next Friend of RONALD EDDLEMON, JR., a Minor; J. MICHAEL SULLIVAN, Individually and as Father and Next Friend of REBECCA MARGARET SULLIVAN, a Minor; CHARLES WILLIAM WARD, Individually and as Father and Next Friend of SANDRA WARD, a Minor, CHARLES WARD, a Minor, NEIL WARD, a Minor, TONYA WARD, a Minor, and PHILLIP WARD, a Minor; and LARRY FETTERS and LILA FETTERS, Husband and Wife.	)	

AFFIDAVIT OF RONALD EDDLEMON, SR.

RONALD EDDLEMON, SR., being first duly sworn on his oath does hereby depose and state as follows:

1. He currently resides at Rural Route 2, North Murphy Road, near the Town of Hanna City, County of Peoria, and State of Illinois.

2. At no time during his life has he ever been physically present within the State of New York nor has he conducted any business with the State of New York on any basis nor

has he had any contacts whatsoever with the State of New York.

3. He first received notice of the possibility of the existence of any claims for personal injuries arising out of his exposure from Agent Orange some time after March 9, 1984 when he received a copy of the notice of the pendency of this class action by mail.

4. Upon receipt of the notice of pendency of this class action, he delivered the same to his personal counsel, DAVID H. McCARTHY, 911 First National Bank Building, Peoria, Illinois 61602. Attorney McCarthy referred the claims of the undersigned and his minor child for personal injuries arising out of exposure to Agent Orange to RICHARD L. STEAGALL and JOHN P. NICOARA for representation and pursuit of these claims.

5. Subsequent to interviews with Attorneys DAVID H. McCARTHY and RICHARD L. STEAGALL, the undersigned was informed that attorney Stegall journeyed to Brooklyn, New York, to review the Court records relating to this matter.

6. Upon return from Brooklyn, New York, the undersigned was advised by his attorney that it appeared that the class action would be tried on issues of liability, general causation, and defendants' defenses, but that individual claims for damages are preserved and would be tried at a later date elsewhere.

7. Based upon the advice of his counsel, RICHARD L. STEAGALL, the undersigned individually and on behalf of his minor child, RONALD EDDLEMON, JR., refrained from opting out of the class action.

8. The undersigned learned of the purported settlement of this class action by popular media accounts on or about May 7, 1984.

9. The undersigned has accepted the recommendation of his counsel, RICHARD L. STEAGALL, that the purported settlement of the class action claims are inadequate, has authorized his counsel to initiate suit on behalf of himself and his minor child in the United States District Court for the Central District of Illinois and has further authorized his counsel to object and reject any attempts to bind the undersigned's claims and those of his minor child to the settlement of this class action and to make all attempts to preserve his rights to try these claims before a jury in the Central District of Illinois.

FURTHER AFFIANT SAYETH NOT.

/s/ Ronald Eddlemon, Sr.
RONALD EDDLEMON, SR.

Subscribed and sworn to before me this 26th day of July, 1984.

/s/ (illegible)
Notary Public

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re "AGENT ORANGE" Product Liability Litigation	MDL No. 381
RONALD EDDLEMON, SR., Individually and as Father and Next Friend of RONALD EDDLEMON, JR., a Minor; J. MICHAEL SULLIVAN, Individually and as Father and Next Friend of REBECCA MARGARET SULLIVAN, a Minor; CHARLES WILLIAM WARD, Individually and as Father and Next Friend of SANDRA WARD, a Minor, CHARLES WARD, a Minor, NEIL WARD, a Minor, TONYA WARD, a Minor, and PHILLIP WARD, a Minor; and LARRY FETTERS and LILA FETTERS, Husband and Wife.	

AFFIDAVIT OF J. MICHAEL SULLIVAN

J. MICHAEL SULLIVAN, being first duly sworn on his oath does hereby depose and state as follows:

1. He currently resides at 5415 Haymeadow, Apt. 2-B, in the City of Peoria, County of Peoria, and State of Illinois. His ex-spouse, PAMELA JORDAN, has custody of his minor child, REBECCA MARGARET SULLIVAN. They reside at 9016 West 140th Street in the City of Orland Park, County of Cook, and State of Illinois.

2. He served with the United States Armed Forces in Vietnam from December 26, 1966 through December 29, 1967.

3. He maintains no business in the State of New York nor does he have any contact whatsoever with the State of New York.

4. He first learned of the existence of a possible claim for personal injuries on his behalf and on behalf of his minor child, REBECCA MARGARET SULLIVAN, on April 24, 1984. He received no notice from this Court as to the existence of this class action.

5. On May 1, 1984, the undersigned retained RICHARD L. STEAGALL and JOHN P. NICOARA to represent him and his minor child in connection with any claims that may have arisen due to his exposure to Agent Orange in Vietnam. The undersigned has accepted the advice of his counsel, RICHARD L. STEAGALL, that this action should be litigated in the State of Illinois and further states that he has authorized his counsel to file the motion to seek exclusion from the class action settlement and also objects to the settlement and further authorizes and directs his said attorney to attempt to preserve his right to try any claims he may have against the named Defendants by a jury in the United States District Court for the Central District of Illinois.

FURTHER AFFIANT SAYETH NOT.

/s/ J. Michael Sullivan
J. MICHAEL SULLIVAN

Subscribed and sworn to before me this 27th day of July, 1984.

/s/
Notary Public

RICHARD L. STEAGALL
JOHN P. NICOARA
815 First Natl. Bank Bldg.
Peoria, Illinois 61602
Telephone: (309) 674-6085

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re "AGENT ORANGE" Product Liability Litigation	MDL No. 381
RONALD EDDLEMON, SR., Individually and as Father and Next Friend of RONALD EDDLEMON, JR., a Minor; J. MICHAEL SULLIVAN, Individually and as Father and Next Friend of REBECCA MARGARET SULLIVAN, a Minor; CHARLES WILLIAM WARD, Individually and as Father and Next Friend of SANDRA WARD, a Minor, CHARLES WARD, a Minor, NEIL WARD, a Minor, TONYA WARD, a Minor, and PHILLIP WARD, a Minor; and LARRY FETTERS and LILA FETTERS, Husband and Wife.	

AFFIDAVIT OF CHARLES WILLIAM WARD

CHARLES WILLIAM WARD, being first duly sworn on his oath does hereby depose and state as follows:

1. He currently resides at 200 Wilmore Road in the City of Washington, County of Tazewell, and State of Illinois.

2. He served with the United States Armed Forces in Vietnam from February, 1968 through February, 1969. Upon his return from Vietnam, he was assigned to duty at Fort Dicks, New Jersey, at which time he served out his ten years

in the United States Armed Forces. He received an honorable discharge from the United States Army on August 29, 1969 and he was terminated from the United States Army Reserves on August 29, 1973.

3. He had entered the City of New York during the time at which he was stationed at Fort Dicks, New Jersey, and he has not been physically present in the State of New York since that time; he conducts no business in the State of New York nor does he have any contact whatsoever with the State of New York. He is presently unemployed.

4. He first learned of a possible claim for personal injuries on his behalf and on behalf of his minor chilren, SANDRA WARD, CHARLES WARD, TONYA WARD, NEIL WARD, and PHILLIP WARD, shortly after the trial of this class action was set for May 7, 1984.

5. On May 16,1984, the undersigned retained RICHARD L. STEAGALL and JOHN P. NICOARA to represent him and his minor children in connection with any claims that may have arisen due to his exposure to Agent Orange in Vietnam. The undersigned has accepted the advice of his counsel, RICHARD L. STEAGALL, that this action should be litigated in the State of Illinois and further states that he has authorized his counsel to file the motion to seek exclusion from the class action settlement and also objects to the settlement and further authorizes and directs his said attorney to attempt to preserve his right to try any claims he may have against the named Defendants by a jury in the United States District Court for the Central District of Illinois.

BEST AVAILA

FURTHER AFFIANT SAYETH NOT.

CHARLES WILLIAM WARD

Subscribed and sworn to before me this ____ day of July, 1984.

Notary Public

RICHARD L. STEAGALL
JOHN P. NICOARA
815 First Natl. Bank Bldg.
Peoria, Illinois 61602
Telephone: (309) 674-6085

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EXHIBIT D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re "AGENT ORANGE" Product Liability Litigation	MDL No. 381
RONALD EDDLEMON, SR., Individually and as Father and Next Friend of RONALD EDDLEMON, JR., a Minor; J. MICHAEL SULLIVAN, Individually and as Father and Next Friend of REBECCA MARGARET SULLIVAN, a Minor; CHARLES WILLIAM WARD, Individually and as Father and Next Friend of SANDRA WARD, a Minor, CHARLES WARD, a Minor, NEIL WARD, a Minor, TONYA WARD, a Minor, and PHILLIP WARD, a Minor; and LARRY FETTERS and LILA FETTERS, Husband and Wife.	

AFFIDAVIT OF LARRY FETTERS

LARRY FETTERS, being first duly sworn on his oath does hereby depose and state as follows:

1. He currently resides with his wife, LILA FETTERS, at 220 North Lybarger in the City of Olympia, County of Thurston, and State of Washington.

2. He was born in Central Illinois and lived in the County of Woodford, State of Illinois until his graduation from high school and enlistment in the United States Army. He

was inducted in the United States Army in Chicago, Illinois in October, 1959

3. He served with the United States Army in Vietnam in the years 1976-1968.

4. He has never been physically present in the City of New York nor the State of New York, transacts no business in the State of New York, and has no contact whatsoever with the State of New York.

5. He had no specific knowledge about the existence of the possibility of his claims for injuries arising out of exposure to Agent Orange and his wife's claims for loss of consortium until after this class action was purportedly settled on May 7, 1984.

6. After he learned of the settlement of this class action and the possibility of the existence of a claim for personal injury, he decided to retain RICHARD L. STEAGALL as his attorney on a return visit to his home area in Peoria, Illinois.

7. On July 6, 1984, the undersigned retained RICHARD L. STEAGALL and JOHN P.NICOARA to represent him in connection with his claims for personal injuries that may have arisen due to his exposure to Agent Orange; his wife, LILA FETTERS, likewise retained said attorneys to represent her in connection with any c ims for loss of consortium she may have.

8. The undersigned has accepted the advice of his counsel, RICHARD L. STEAGALL, that the purported settlement of this class action in a an inadequate settlement of his claims, and that he puruse his claims in a form other than the United States District Court for the Eastern District of New York. He has directed his said attorney to object to his inclusion

in any class action settement or judgment that bars his rights to assert his claims for personal injuries arising out of exposure to Agent Orange in forums other than the State of New York had has instructed his undersigned attorney to pursue litigation of his claims in the action pending in the United States District Court for the Central District of Illinois.

FURTHER AFFIANT SAYETH NOT.

LARRY FETTERS

STATE OF WASHINGTON)
) SS.
COUNTY OF THURSTON)

Subscribed and sworn to before me this ____ day of July, 1984.

Notary Public

RICHARD L. STEAGALL
JOHN P.NICOARA
815 First Natl. Bank Bldg.
Peoria, Illinois 61602
Telephone: (309) 674-6085

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re "AGENT ORANGE" Product Liability Litigation	MDL No. 381
RONALD EDDLEMON, SR., Individually and as Father and Next Friend of RONALD EDDLEMON, JR., a Minor; J. MICHAEL SULLIVAN, Individually and as Father and Next Friend of REBECCA MARGARET SULLIVAN, a Minor; CHARLES WILLIAM WARD, Individually and as Father and Next Friend of SANDRA WARD, a Minor, CHARLES WARD, a Minor, NEIL WARD, a Minor, TONYA WARD, a Minor, and PHILLIP WARD, a Minor; and LARRY FETTERS and LILA FETTERS, Husband and Wife.	

AFFIDAVIT OF RICHARD L. STEAGALL

RICHARD L. STEAGALL, being first duly sworn on his oat does hereby depose and state as follows:

1. He is an attorney at law licensed to practice in the States of Florida and Illinois, before the United States District Courts for the Middle District of Florida and the Central District of Illinois, the United States Court of Appeals for the Seventh Circuit, and the Supreme Court of the United States of America.

2. His first professional connection with the existence of this class action was a referral of RONALD EDDLEMON, SR. he received from Attorney DAVID H. McCARTHY on April 9, 1984, at which time RONALD EDDLEMON, SR. retained him to represent him in connection with his claims and the claims of his minor child, RONALD EDDLEMON, JR., for personal injuries arising out of exposure to Agent Orange.

3. Subsequent to being retained by RONALD EDDLEMON, SR., the undersigned journeyed to Brooklyn, New York on April 25, 1984 and conducted a review of the Court files located in the office of the Clerk of this United States District Court for the Eastern District of New York in Brooklyn, New York.

4. The Court files relating to this class action are extremely voluminous and the undersigned was unable to complete a detailed review of the Court files in the day's time that he was in the clerk's office in Brooklyn, New York.

5. In reliance upon this Court's opinion of December 16, 1983 certifying the class action for trial, the undersigned advised his client, RONALD EDDLEMON, SR., to refrain from opting out of the class action. This was based upon this Court's reservation of trial of the individual damage claims for future determination after the conclusion of the initial trial of the class action.

6. The undersigned first learned of the settlement of this class action on May 7,1984, but did not receive any detailed notice of this settlement until July 16,1984 when he received a Notice of Proposed Settlement of Class Action and Claim Form, despite his May 8, 1984 request of the Clerk of this Court that he receive copies of any proposed settlement documents.

7. The undersigned has never contacted any attorney for the Plaintiffs' Management Committee nor participated in any way in the prepartion of this class action.

8. The May 1, 1984 deadline for exercise of the right to opt out of this class action was unreasonably short and gave the undersigned an inadequate period of time in which to journey to this Court in Brooklyn, New York to take five days out of an extremely busy trial practice to engage in a detailed review of Court records relating to the class action.

9. In view of the insufficient time available to adequately and fully evaluate matters relating to this class action, the undersigned told RONALD EDDLEMON, SR. that the best advice available to him at that time was to refrain from opting out of this class action while fully conceding that the undersigned had inadequate basis to properly formulate such a professional opinion due to the unreasonably short period of time in which the decision to opt out of the class action was required.

FURTHER AFFIANT SAYETH NOT.

/s/ Richard L. Steagall
RICHARD L. STEAGALL

Subscribed and sworn to before
me this 27th day of July, 1984

/s/ Mary M.
Notary Public

RICHARD L. STEAGALL
JOHN P. NICOARA
815 First Natl. Bank Bldg.
Peoria, Illinois 61602
Telephone: (309) 674-6085